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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JULIO CESAR WILSON STAJANO, ET AL.,
PETITIONERS

v.

UNITED TECHNOLOGIES CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

PAUL C. MATTHEWS
Counsel of Record
54 Stone Street
New York, NY 10004
(212) 344-1936
Attorney for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 233-3160 ♦ USSCINFO.COM

QUESTIONS PRESENTED

1. Whether a military contractor defense bars, as a matter of law, claims for defective design without meaningful participation by the government in the design, manufacture or acceptance of the accident helicopter's component parts which are the subject of the litigation?

2. Whether a military contractor defense bars, as a matter of law, claims for defective design and failure to warn, in the absence of government input or control over the flight manuals produced by Defendants or evidence that that the government was provided with warnings but chose not to include them in the flight manuals?

3. Whether the military contractor defense bars, as a matter of law, claims for defective design of the component parts of a civilian-designed helicopter, where the manufacturer failed to provide notice of available safety components incorporated into other helicopters on the same assembly line at the same time for sale to another government?

4. Whether the military contractor defense bars, as a matter of law, claims for defective design of the component parts of a civilian-designed helicopter, where the manufacturer failed to provide alternative safety components available under the state of the art at the time of design, and requested by the Government?

INTERESTED PARTIES

The following parties and entities were parties below and have an interest in the outcome of this consolidated case:

1. Plaintiffs - Julio Cesar Wilson Stajano and Ana Maria Delgatte de Stajano (individually, and as parents and natural guardians of infant Plaintiff Chantal Delgatte); Alberto Anibal Lopez (individually and as parent and natural guardians of infant Miguel Angel Lopez); Chantal Stajano Moina Jack Secco Scorza; and Robert B. Tchodjuklian.

2. Defendants - United Technologies Corporation, of New York, United Technologies Corporation and Sikorsky Aircraft, Inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

INTERESTED PARTIES ii

TABLE OF CONTENTS iii

TABLE OF CITATIONS vi

PRELIMINARY STATEMENT 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 3

FEDERAL ISSUES INVOLVED 3

STATEMENT OF THE FACTS 5

CASE HISTORY 9

REASONS FOR GRANTING THE WRIT 13

CONCLUSION 27

APPENDIX

DECISION AND ORDER OF THE COURT OF APPEALS OF NEW YORK, DENYING LEAVE TO APPEAL, ENTERED OCTOBER 26, 2004, STAJANO V. UNITED TECHNOLOGIES CORPORATION, 3 N.Y.3D 736, — N.E.2D —, ... 1a

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, DENYING PLAINTIFFS' MOTION FOR REARGUMENT OR IN THE ALTERNATIVE,

LEAVE TO APPEAL TO THE COURT OF APPEALS, ENTERED JULY 1, 2004 ..... 2a

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPT., AFFIRMING DISMISSAL, ENTERED MARCH 23, 2004, 5 A.D.3D 260, 774 N.Y.S.2D 409 (1ST DEPT. 2004) 3a

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK (KORNREICH, J.S.C.), DENYING PLAINTIFFS' MOTION TO RENEW, REARGUE AND/OR VACATE OCTOBER 22, 2002 DECISION, ORDER AND JUDGMENT, MARCH 13, 2003 ..... 5a

DECISION, ORDER AND JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, GRANTING SUMMARY JUDGMENT DISMISSING COMPLAINTS, ENTERED OCTOBER 22, 2002 ..... 7a

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, AFFIRMING DENIAL OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, ENTERED JUNE 27, 2000, 273 A.D.2D 162, 711 N.Y.S.2D 718 (1ST DEPT. 2000), ... 37a

DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, ENTERED JANUARY 7, 2000 ..... 39a

AUGUST 26, 1958 LETTER/REPORT OF U.S. NAVAL AIR MINE DEFENSE DEVELOPMENT UNIT 49a

HEARING AND DEPOSITION OF WALDEMAR RAMON PERDOMO, MONTEVIDEO, URUGUAY, APRIL 5, 1972 ..... 55a

EXTERIOR CARGO HOOK, POSITIVE DISCONNECT EXPLOSIVE BOLT AND EMERGENCY MECHANICAL PROPOSED CO-PILOT RELEAS 59a

TABLE OF CITATIONS

CASES

BOYLE V. UNITED TECHNOLOGIES CORP., 487 U.S. 500, 108 S. CT. 2510 (1988) ..... *passim*

DENSBERGER V. UNITED TECHNOLOGIES CORP., 297 F.3D 66 (2D CIR. 2002), CERT. DENIED, 537 U.S. 1147, 123 S.CT. 876 ..... 19, 25

HARDUVEL V. GENERAL DYNAMICS CORP. [878 F.2D 1311, 1316 (11TH CIR. 1989), CERT. DENIED, 494 U.S. 1030, 110 S.CT. 1479, 108 L.ED.2D 615 (1990) 24

MILLER V. UNITED TECHNOLOGIES CORP., 233 CONN. 732, 660 A.2D 810 (1995) 20, 21, 22, 23

TIMBERLINE AIR SERVICE, INC. V. BELL HELICOPTER-TEXTRON, INC., 125 WASH.2D 305 (1994)(EN BANC) 25

TREVINO V. GENERAL DYNAMICS CORP., 865 F.2D 1474, 1486(5TH CIR.), REH. DENIED EN BANC, 876 F.2D 1154, CERT. DENIED, 493 U.S. 935, 110 S.CT. 327, 107 L.ED.2D 317 (1989) 23

MISCELLANEOUS

28 U.S.C. §1257(a)(1970) 3

28 U.S.C. §1346(b) 4

28 U.S.C. §2680(a) 4

PRELIMINARY STATEMENT

Petitioners, Plaintiffs who suffered severe personal injuries resulting from a crash of Defendants' helicopter as spectators of an air show on the beach in Pocitos, Montevideo, Uruguay on November 14, 1971, Petition for a Writ of Certiorari to review the Memorandum Decision and Order of the New York State Supreme Court, Appellate Division, First Department, affirming dismissal of their complaints on summary judgment, entered March 23, 2004.(3a-4a).

The dismissal of Petitioners' complaints was based solely upon the military contractor defense enunciated in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510 (1988).

As a result of the Tupamaro Insurrection (Marxist Leninist Guerillas from Argentina) that captured, tortured and killed CIA Employee Daniel Mitrioni, formerly Police Chief Terra Haute, Indiana, in support of Uruguay's attempts to quell guerillas, U.S. Government transferred to Uruguay in Military, two counter-insurgency helicopters ostensibly equipped for air sea rescue in 1981.

OPINIONS BELOW

The Order of the New York State Court of Appeals, denying discretionary review is reported at 3 N.Y.3d 736, --- N.E.2d --- (October 26, 2004) and is reprinted at App. P. 1a.

The July 1, 2004 Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, denying Plaintiffs' motion for reargument or in the alternative, leave to appeal to the Court of Appeals, is unreported and is reprinted at App. P. 2a.

The March 23, 2004 Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, affirming dismissal of Petitioners' complaints, is reported at 5 A.D.3d 260, 774 N.Y.S.2d 409)(1st Dept. 2004) and is reprinted at App. p. 3a-4a.

The February 28, 2003 Decision and Order of the Supreme Court of the State of New York, County of New York, denying Plaintiffs' motion to renew, reargue or vacate the October 22, 2002 Decision, Order and Judgment of the Supreme Court, New York County is unreported and is reprinted at App. p. 5a-6a.

The October 22, 2002 Decision, Order and Judgment of the Supreme Court of the State of New York, County of New York, granting summary judgment dismissing Petitioners' complaints is unreported and is reprinted at App. P. 7a-36a.

The June 27, 2000 Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department, affirming denial of Defendant's motion for summary judgment, is reported at 273 A.D.2d 162, 711 N.Y.S.2d 718 (1st Dept. 2000) and is reprinted at App. p. 37a-38a

The June 7, 2000 Decision and Order of the Supreme Court of the State of New York, County of New York, denying summary judgment to dismiss Petitioners' complaints, is unreported and is reprinted at App. p. 39a-48a.

STATEMENT OF JURISDICTION

The decision and Order of the New York State Supreme Court, Appellate Division, First Department was entered March 23, 2004, affirming dismissal of Plaintiffs' complaints. App. p. 3a-4a.

Petitioners' motion to reargue or for leave to appeal to the Court of Appeals was denied by the Appellate Division, First Department Order entered July 1, 2004. App. p. 2a.

Petitioner's motion for leave to appeal was denied by the New York State Court of Appeals by Order entered on October 26, 2004. App. p. 1a.

Granting a prior motion to enlarge time to file a Petition for a Writ of Certiorari, this Court extended the time to file until March 25, 2005. Jurisdiction is invoked pursuant to 28 U.S.C. §1257(a)(1970).

FEDERAL ISSUES INVOLVED

The instant case was dismissed on the authority and precedent of *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S. Ct. 2510 (1988), wherein this Court fashioned the federal common law to provide a defense for

a government (military) contractor supplying helicopters to the United States, based upon, *inter alia*, a "uniquely federal interest". *Id.*, at 507, 108 S.Ct., at 2516.

The *Boyle* common law rule protecting a military contractor is stated as follows:

> Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. *Id.*, at 512, 108 S.Ct., at 2519.

This Court has also recognized the Federal Tort Claims Act, 28 U.S.C. §1346(b), as suggesting a "significant conflict" between federal law and state law with respect to Government procurement involving discretionary decision-making, which provides a liability exemption for:

> [a]ny claim ... based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. 28 U.S.C. §2680(a). *Boyle, supra*, at 511, 108 S.Ct, at 2518.

This case was dismissed, on summary judgment, based upon the "uniquely federal interest" enunciated on *Boyle, supra*, and the federal common law enunciated therein, developing the military contractor's defense.

STATEMENT OF THE FACTS

In or about December 1957, Defendants, doing business as Sikorsky Aircraft, Inc., manufactured two naval helicopters with civilian designation S-58, Army designation H-34A, Air Force designation H-34, Navy designation HSS-1, and Marines designation HUS-1. The two S-58 helicopters' serial numbers were 143934 and 143941, and were built for the United States Navy, under Navy designation HSS-1. Although each naval helicopter was initially intended for anti-submarine warfare and provided with sonar equipment, these naval helicopters were also specially designated and equipped for use as air-sea rescue naval aircraft, with a factory-installed 600 lb. air-sea rescue hoist.

THE CARGO HOOK INSTALLED ABOARD THE ACCIDENT NAVAL HELICOPTER

Although initially denied by the Defendants, it was later discovered that Sikorsky intentionally strengthened both of the naval aircrafts' hulls, so that each naval helicopter would be capable of lifting 5,000 lbs, with the use of a cargo hook, to be subsequently installed. It was also discovered that in conjunction with the reinforcement of the subject naval helicopters' hulls, Sikorsky also factory-installed all of the internal release equipment used by the crew of the naval aircraft to release any load carried by the external cargo hook. This

equipment included safety release mechanisms, both electrical and mechanical, that would, *inter alia*, be called upon by the pilot and/or co-pilot in the event of an emergency situation, where the cargo would have to be dropped in order to protect the aircraft and crew.

The release equipment aboard the aforementioned naval aircraft consisted of electronic cargo release buttons on the pilot and co-pilot flight control sticks. A master "arming" switch was also installed in the naval aircraft, which prevented the flow of electricity to the button on the flight control sticks. There was also a single mechanical release located on the floor of the cabin, accessible only to the pilot, using his right foot. According to Robert Nokes, the Plaintiff's expert witness and a person well familiar with Sikorsky's manufacturing and installation procedures, all of the release mechanisms, which consisted of both a single manual mechanical system and a separate electrical system (including switches, electric wiring, wiring harnesses and housings) inside of the naval helicopter involved in the release of cargo from a cargo hook were installed by Sikorsky prior to delivery to the United States Navy.

Mr. Nokes, in reading the specifications for the subject accident naval helicopter, *which was not provided by the Defendants until October 7, 1998*, noted that the "aircraft is to have 'PROVISION FOR CARGO.'" Thus, the naval helicopter's hull was "strengthened and provided with a means to attach an external cargo hook with a capacity of 4,000 lb. or subsequently 5,000 lb." Mr. Nokes also read and translated the definition of the term "PROVISION FOR" in the document to indicate that "all mechanical and electrical systems associated with the cargo hook were installed by Sikorsky at the time of

aircraft manufacture (December, 1957) and prior to delivery to the United States Government. Said cargo hook to be attached at a later date by the Government, at its option."

The recently obtained information concerning Sikorsky's installation of the operating and release systems for the cargo hook installations was significant, inasmuch as the Plaintiffs have persistently maintained that the external cargo hook system was defective. Moreover, Defendants persistently denied that Sikorsky had anything to do with the cargo hook assembly.

Subsequently, a Sikorsky Model SP4070 cargo hook, was, in fact, installed on the subject naval helicopter. Consistent with certain Sikorsky parts, the subject cargo hook was manufactured by another company, Eastern Rotorcraft, but the hook was designed, tested, approved and sold by Sikorsky for use on the subject naval aircraft, assigned a part number (SP4070), and a control drawing number of S1650-62195. Mr. Nokes identified the hook from photographs taken just prior to the subject accident.

THE ACCIDENT IN URUGUAY

In March, 1971, both aforementioned naval helicopters were sold to the Uruguayan Navy, along with installed cargo hook assemblies, and designated description Numbers A-061 an A-062.

The naval aircraft were employed by the Uruguayan Navy in a naval air show demonstration adjacent to the beach in Pocitos, Montevideo, Uruguay on

November 14, 1971. It was Sunday, and the newspapers estimate that between 5,000 and 10,000 spectators were present to witness the air show.

Both naval helicopters were parked with their lifting blades rotating slowly on a promontory of land jetting out into the Mar del Plata, a large bay which serves as the southern border for Uruguay and the northern frontier for Argentina. Alongside the naval helicopters was an ice-cream vendor's building. Located on this promontory was one of the two naval helicopters bearing Uruguayan Navy identification number A-061, under the command of Captain Waldmar Perdomo.

This naval helicopter (A-061) lifted off the ground and swung over a jeep in order to hook its external cargo hook to the vehicle, through the use of a four-legged sling, which was secured to the four quarters of the jeep, and known as a "four-legged bridle."

The four-corner hook-up of the vehicle, after being completed, allowed the naval helicopter to rise into the air thereby lifting the jeep from its resting position into the air and over the ocean.

While the jeep was being flown over the ocean, one corner of the bridle became loose, causing the front of the jeep to tilt downward which in turn destabilized the naval helicopter's flight condition. Captain Perdomo was unable to sever the cargo. App. p 55a. Unable to sever the cargo, the naval helicopter swung into shore with its forward section pointing downward, attempting to land the Jeep near the site where the flight originated.

The destabilized naval aircraft lost altitude returning to shore and appeared to be pulled down from the sky by its unbalanced cargo, when the jeep struck the supporting rocks below the embankment.

The jeep, striking the embankment, became an anchor, which pulled the naval helicopter to the ground, where it collided with a second naval helicopter causing a horrendous fire, explosions, and flying debris field.

The accident caused the immediate death of eight people and multiple injuries to some 40 to 100 spectators, including the five infants who brought the present lawsuit.

CASE HISTORY

This action and the actions of many other injured Uruguayan citizens arising from the same occurrence were commenced in New York in 1978 and 1980. The instant plaintiffs were infants at the time of the occurrence. After the commencement of these actions, defendants moved to dismiss on the grounds of forum non conveniens. The Supreme Court, New York County (Fraiman, J.) conditionally granted the defendants' motion on January 10, 1980, and directed defendants to provide a general appearance in an action to be commenced in Uruguay, and further directed the defendants not to raise a Statute of Limitations defense other than as the Statute of Limitations may have been applicable on March 23, 1978, the date the first of these related actions was commenced.

Defendants appealed the January 10, 1980 order to Appellate Division, First Department, which modified said order by holding that the actions could be commenced in Connecticut as well as Uruguay, but otherwise affirmed. 97 A.D.2d 593, 433 N.Y.S.2d 807 (1st Dept. 1980)

On July 2, 1980, the Supreme Court (Fraiman, J.) granted defendants motion to dismiss upon the ground of Statute of Limitations, but the trial court specifically exempted all actions brought by plaintiffs who were infants on the date of the accident, if such actions were not time barred under New York law by reason of the infant tolling provision of CPLR §208. This order was also appealed and affirmed.

Thereafter, actions were commenced in the United States District Court for the District of Connecticut, on behalf of all plaintiffs who were infants on November 14, 1971. In clear violation of two separate Orders of the Supreme Court of the State of New York, both of which were affirmed on appeal, the defendants moved to dismiss the complaints based upon a Statute of Limitations defense. Inasmuch as Connecticut has no infant tolling provision the plaintiffs' actions were dismissed on November 6, 1985 (two (2) actions) and January 29, 1987 (the remaining three (3) actions).

On February 13, 1990, the Supreme Court, New York County (Greenfield, J.) granted plaintiffs' application to restore the five infant cases to the calendar. 148 Misc.2d 918, 562 N.Y.S.2d 903 (1990). Defendants again appealed, but the restorations were affirmed on May 28, 1991. 173 A.D.2d 394, 570 N.Y.S.2d 25 (1st Dept. 1991).

PLEADINGS

Defendants' September 8, 1991 motion to amend their answer to add the government contractor's defense was granted on May 24, 1992 by the Supreme Court, New York County (Greenfield, J.). However, Defendants did not assert a military contractor defense to the accident aircraft, as subsequently modified, or specifically for the internal and external components of the cargo carrying and release systems at issue.

Instead, Defendants made material misrepresentations about their involvement in the internal and external cargo carrying and release systems to the Court and plaintiffs' counsel. As the trial Court noted:

> THE COURT: Right now, as I understand it, Mr. Cook is saying we never had anything to do with cargo slings, hooks or release mechanisms . . .

Plaintiffs maintain that a fail safe shear pin would have severed the jeep, rather than permitting the cargo to act as a anchor, dragging the naval helicopter to the ground upon impact with the supporting rocks ashore. Moreover, a guillotine device, or explosive bolt, would have permitted another member of the crew to drop the load when trouble was discovered.

Strikingly, an August 26, 1958 Letter/Report of U.S. Naval Air Mine Defense Development Unit requested "that an explosive bolt attaching device be installed at the tow boom attachment point to assure release of the tow should the manual and electrical

systems fail." *See*, App. p. 49a.[1] The recommendations of August 26, 1958 (App. p. 49a) by the U.S. Government to improve repair and render positive disconnecting external cargo are the two items proposed co-pilot release and positive disconnect explosive bolt integrated into hook. App. p. 59a.

SUMMARY JUDGMENT GRANTED ON NEWLY AMENDED MILITARY CONTRACTOR DEFENSE

With at least five (5) prior motions pending before Justice Schoenfeld, many of which demanded outstanding discovery requested by Plaintiffs and/or sought to punish Defendants for long-standing discovery abuses, acting Supreme Court Justice Kornreich ignored the motions, and, after the close of discovery, permitted Defendants to amend their answer, denied Plaintiffs further discovery on newly added military contractor defenses, and simultaneously, granted Defendants summary judgment.

However, Defendants were not entitled to summary judgment, inasmuch as Defendants failed to prove that the component parts in issue were designed and manufactured in conformance with reasonably precise specifications, and that Defendants warned the Government about known dangers.

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[1] The August 26, 1958 Letter/Report of U.S. Naval Air Mine Defense Development Unit reported that the "manual hook release system has never worked under any condition of tension." The document also states that the "electrical hook release system has failed twice." The document notes a "tow tension of between 2500 and 3000 pounds is the maximum that can be obtained."

Tellingly, Defendants presented no proof the component parts in issue were ever 'signed off', either in design or receipt, by the Government, that the Defendants addressed a request for an explosive bolt to sever the load, or that the Defendants offered dual mechanical releases (one for the pilot and one for the co-pilot), *similar to releases installed aboard the same helicopters sold to Germany, which were a few production numbers from the accident helicopters.*

REASONS FOR GRANTING THE WRIT

Recently, apart from military action there have been multiple disasters involving various Black Hawk models:

See VFW Magazine, March 1, 2003 by Tim Dyhouse:

1. Black hawk crash kills four in Afghanistan - Security - US military helicopter crash.

> A U.S. helicopter crashed during a training exercise Jan. 30 in Afghanistan killing four soldiers. The incident occurred about six miles east of Bagram Air Base in an area known as the East Training Range. A spokesman for U.S. Central Command in Tampa, Fla., said the crash, which involved an MH-60L Black Hawk carrying two pilots and two crew members, was an accident.

See VFW Magazine, September 1, 2003 by Tim Dyhouse:

2. Navy helicopter crash kills four - Security:

See VFW Magazine, May 1, 2003:

3. 11 Killed in Fort Drum crash - Security - helicopter crash under investigation:

> A Black Hawk helicopter crashed during a March 11 training mission at Fort Drum, N.Y., killing 11 soldiers and injuring two. At press time, the Army was still investigating the cause.

4. Afghanistan crash kills six - Security - helicopter crash:

> An Air Force Pave Hawk helicopter crashed March 23 in Afghanistan killing all six on board. The crew was conducting a medical evacuation mission when it crashed some 81 miles north of Ghazni. U.S. Central Command stated the helicopter was not shot down and was investigating the cause at press time.

See VFW Magazine, April, 2003 by Tim Dyhouse:

5. Kuwait black hawk crash kills four - Security:

> Four U.S. Army soldiers were killed Feb. 25 when their Black Hawk helicopter crashed during a training exercise in Kuwait. A Pentagon spokesman said there was no indication that hostile fire caused the crash.

An investigation from a Stratford Program on July 2003, revealed the following:

> **The Black Hawk helicopter's troubled history** (Stratford-WTNH, Apr. 29, 2003 6:00 PM) - They are a work horse of the US military but there are questions about what's going into the Connecticut built Black Hawk. They're used all over the military and made here in Connecticut. A Team 8 investigation has uncovered questions about the Black Hawk and how it's made.
>
> The move follows a Team 8 investigation showing defective parts are sometimes slipping through the company's quality inspection process, and that the Defense Department has cited Sikorsky for 19 quality control problems.
>
> This month, a company which processed parts for a Sikorsky supplier was indicted in California. Reporter John Donnelly investigated the case for Defense Week magazine and says Sikorsky was unaware one of its sub-contractors was doing business with a firm making faulty parts.
>
> "Sikorsky and other manufacturers failed in their oversight of their sub contractors to detect this flaw," Donnelly said.
>
> It's one thing for bad parts to show up on the production line, but is there any

evidence of defective parts getting to aircraft at military bases? The answer Team 8 has learned is yes.

According to a Sikorsky document obtained by News Channel 8, 8-months after the Defense Department ordered Sikorsky to fix it's quality control problems, the commanding officers at two military bases "complained" bolts on replacement engine mounts supplied by Sikorsky wouldn't fit the holes they were suppose to go through. "The AFT engine mount," explained Allen Haggerty.

"An important part?"

"Certainly."

It's not the only example we found. In April, leaks were discovered in a gear box on a Black Hawk helicopter. Sikorsky engineers noting in the past "the supplier had not been following the correct bonding procedure."

In the meantime, the Army says it appears four recent fatal crashes of the Black Hawk were due to either human or environment factors, not mechanical problems. However, the Army says three other recent Black Hawk accidents were due to mechanical failures.

> The Defense Department tells News Channel 8 Sikorsky "has terminated its business relationships with several vendors which do not meet their standards."

The cumulative history of helicopter accidents, resulting from defective civilian design, defective manufacture and defective construction have only begun resulting in aircraft catastrophes mostly involving the passengers and crew of said helicopters.

Now as the production and use of helicopters increases along with concomitant defective construction and design, the quantity of injuries will dramatically increase for the operators and passengers of said helicopters.

The increase in helicopter disasters will affect innocent bystanders on the ground, and identical to the instant litigation commenced by the innocent spectators in Uruguay, those innocent victims on the ground will have their action for injuries or death shunted aside, blunted or denied due process by being dismissed under an overbroad military contractor defense.

NEW YORK STATE COURTS MISUNDERSTAND THE SHOWING REQUIRED TO INVOKE THE MILITARY CONTRACTOR DEFENSE ENUNCIATED IN *BOYLE, SUPRA*, AND DEPRIVED PETITIONERS OF THEIR DAY IN COURT BASED UPON AN UNRESTRAINED APPLICATION OF THIS COURT'S JUDICIALLY CREATED DEFENSE.

The Appellate Division, First Department, affirmed the trial court's summary deprivation of Petitioners' day in Court based upon *Boyle, supra.* The dismissal occurred in the absence of evidence that the internal and external components of the cargo carrying and release systems at issue in the instant helicopter disaster were approved, at all, by the Government. In fact, the Defendants even disputed the type of hook identified by Petitioners' expert witness. No Government-supplied specifications or approval for the Sikorsky hook and component parts identified by Petitioners were ever exhibited by the Defendants.

This case is a prime example of the dangers inherent in a "rubber stamp" application of the military contractor defense. As a result, and as foreseen in Justice Brennan's dissenting opinion in *Boyle*, innocent bystanders injured by a helicopter initially designed for civilian use have been "rubber stamp[ed]" out of Court for severe injuries resulting from design defects and failures to warn which were plainly avoidable.

IN DISMISSING PETITIONERS' FAILURE TO WARN CLAIMS BASED UPON THE MILITARY CONTRACTOR DEFENSE, THIS CASE STANDS IN STARK CONTRAST TO *BOYLE* PROGENY.

The state courts paid little, if any, attention to *Densberger v. United Technologies Corp.*, 297 F.3d 66 (2d Cir. 2002), *cert. denied*, 537 U.S. 1147, 123 S.Ct. 876 which applied the three prong of *Boyle, supra*, to the military contractor defense in failure to warn cases.

Certiorari is sought not only to reverse the dismissal of five severely injured citizens of Uruguay, but also to correct and assist application of the federal common law by the Courts of the State of New York, and protect our servicemen and people across the world, the latest being survivors of the tsunamis in Asia, from a perfunctory application of *Boyle, supra* and erroneous release of manufacturers from liability pursuant to the military contractor defense.

The ease at which the Appellate Division affirmed the Supreme Court's deprivation of Petitioners' rights on summary judgment should not pass unnoticed. The instant record before the state courts contained literally dozens of disputed issues of material facts. Nevertheless, despite a dispute as to the actual component parts involved in the accident, and Defendants' failure to present evidence that the actual component parts in issue complied with any specifications, the manufacturer was relieved of liability.

Finally, the Court of Appeal's refusal to grant discretionary review of such an enormous violation of Petitioners' rights, and the fundamental tenet that

entities be held accountable for their wrongful conduct, warrants review by this Court to ensure that the military contractor defense enunciated in *Boyle, supra*, does not become a "rubber stamp" justification to deprive injured parties a claim against defective engineering which was *not* required by our Government.

POINT I

THE COURTS' SUMMARY DISMISSAL OF PETITIONER'S CLAIMS PURSUANT TO THE MILITARY CONTRACTOR DEFENSE IS AN ERRONEOUS AND DANGEROUS PRECEDENT THAT WARRANTS INTERVENTION BY THIS COURT.

It is well-known that "summary judgment is not well suited to the disposal of complex cases." *Miller v. United Technologies Corp.*, 233 Conn. 732, 660 A.2d 810 (1995)(design/manufacture and failure to warn respecting component in F-16B fighter aircraft). This is particularly true, where, as here, the "case presents an extraordinary technical and multifarious factual labyrinth." *Id.* Moreover,

> [f]ederal common law provides support for the proposition that this case should not be disposed by summary judgment. It is well established that whether a contractor is shielded from liability by the government contractor defense may be either a question of law or a question of fact. 3 L. Frumer & M. Friedman, Product Liability (1994) §3.40[1]. This was clearly set forth in Boyle, which, applying federal law, stated

> that whether the facts establish the conditions for the government contract defense is a jury question [emphasis added]. Boyle v. United Technologies Corp., supra, 487 U.S. 500, 108 S. Ct. 2510. Only if "no reasonable jury could find . . . on the basis of the evidence presented, that the Government contractor defense was inapplicable" is a defendant entitled to judgment as a matter of law. Id., at 514, 108 S.Ct. at 2519-20. *Miller, supra*, at 775, 660 A.2d 810, 833, n. 28.

The *Miller* Court further held:

> Finally, a summary determination that the plaintiff had failed to prove a manufacturing defect was an inappropriate basis for summary judgment on this issue.
>
> *First, the defendants must satisfy the three elements of Boyle before the burden shifts to the plaintiffs to present evidence of a manufacturing defect* [emphasis added]. *Bailey v. McDonnell Douglas Corp.*, supra, 989 F.2d at 802. "To say that a product failed to conform to specifications is just another way of saying that it was defectively manufactured." *Harduvel v. General Dynamics Corp.*, supra, 878 F.2d at 1321.
>
> Thus, the trial court must first analyze, according to the elements of *Boyle*, the plaintiff's various claims that the fuel

> pump did not conform to specifications. *Only if the trial court determines that the defendant has satisfied the three elements of Boyle for each of the alleged specifications must the court consider the plaintiff's proof of a manufacturing defect* [emphasis added]. *Id.* In *Bailey*, the court determined that "[b]ecause [the defendant] did not present evidence that the three *Boyle* conditions were satisfied with respect to the [specification at issue], upon which Bailey's manufacturing defect claim was based, it did not meet its burden of proof with respect to that claim; and, therefore, the burden did not shift to Bailey to present evidence to support her claim." *Bailey v. McDonnell Douglas Corp.*, supra, at 802. As we have previously stated, in this case, the trial court failed properly to engage in the initial *Boyle* analysis. For these reasons, we conclude that the trial court improperly granted summary judgment for Pratt & Whitney and Chandler- Evans. *Miller, supra*, at 779, 660 A.2d 810, 834.

In the case at bar, Defendants failed to demonstrate any precise specifications proscribed by the government for its external cargo carrying system or internal component parts at all. Defendants likewise failed to demonstrate that the external cargo carrying system and internal components for the accident helicopter complied with these absent specifications. The DD-250, a conditional acceptance form by the government was signed in 1957, seven years prior to the insallation of

the external cargo hook and the connection of the internal parts for the cargo carrying system. Obviously, the DD-250 in 1957 did not approve the external cargo carrying system later installed.

More importantly, Defendants never offered any DD-250 for the particular Sikorsky external cargo carrying system, the cargo hook or the internal components (all of which components are at issue in this action) which were installed aboard the accident helicopter. Nor did Defendants provide admissible proof by witness with actual knowledge that the particular external cargo carrying system, the cargo hook and the internal components involved in the subject accident conformed to any specifications at all.

It bears emphasis that the DD-250 provided by Defendants related to the delivery of the accident aircraft prior to the time that Sikorsky's component parts involved in the subject accident were installed in the aircraft. Moreover, the state courts disregarded Defendants' own approved publications which admit that the civilian S-58 helicopter was designed prior to production for military use.

Even if the U.S. Navy made a subsequent rubber stamp approval (which it did not) of the component parts in issue, this clearly would not afford Defendants the benefits of a military contractors defense as to the external cargo carrying system and its components. *Miller, supra*, at 760, 660 A.2d 810, 825-26 ("The approval must constitute more than a mere 'rubber stamp' by the government. Trevino v. General Dynamics Corp., 865 F.2d 1474, 1486 (5th Cir.), reh. denied en banc, 876 F.2d 1154, cert. denied, 493 U.S. 935, 110 S.Ct. 327, 107

L.Ed.2d 317 (1989). Rather, it must be the result of a 'continuous back and forth' between the contractors and the government. Harduvel v. General Dynamics Corp. [878 F.2d 1311, 1316 (11th Cir. 1989), cert. denied, 494 U.S. 1030, 110 S.Ct. 1479, 108 L.Ed.2d 615 (1990)]."

Defendants offered absolutely no evidence to establish any 'continuous back and forth,' any testing or any negotiation with the government in the design and manufacture of the external cargo carrying system at all. It bears emphasis that the drawings of the cargo hook and other components were completely devoid of any government acceptance. Moreover, other than a general desired capacity of the external cargo carrying system, Defendants offer no "reasonably precise specifications" concerning the design of the external cargo carrying system.

To the contrary, the August 26, 1958 Letter/Report of U.S. Naval Air Mine Defense Development Unit clearly gave Defendants notice that the cargo hook was defective, and failed to release. Defendants did not explain any response to the Government's request for an explosive bolt to sever the load in the event of emergency. Moreover, explosive bolts, of the type used at the time on the rescue hoist for the accident helicopter, were clearly state of the art at the time of design of the aircraft, having been employed on the 600 lb. rescue hoist.

The state courts' refusal to permit a jury to determine clearly disputed issues of fact surrounding Defendants' military contractor defense requires guidance from this Court.

POINT II

THE STATE COURT'S DISMISSAL OF PETITIONERS' FAILURE TO WARN CAUSE OF ACTION VIOLATES *BOYLE* PROGENY.

In *Densberger v. United Technologies Corporation*, 297 F.3d 66 (2d Cir. 2002), The Second Circuit enunciated three requirements of the Boyle test for failure-to-warn cases: (1) 'government control over the nature of the warnings'; (2) 'compliance with the Government's directions'; and (3) 'communication to the Government of all product dangers known to it but not the Government.' *Id.*, at 75, n. 11. *See also, Timberline Air Service, Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wash.2d 305 (1994)(en banc)(military contractor defense to claims for failure to warn, independently subject to requirements of *Boyle). Densberger*, in discussing the third prong, recognized:

> A defendant, for example, might well be unreasonable in failing to warn about information already known to the purchaser if the defendant was unaware that the purchaser had the information. The instruction is also wrong with respect to the causation issue, because it is possible that if the Army *had* been warned of the danger of which it already knew, it might have warned the pilots, and would have done so even if, absent a warning, it had failed to caution them. Thus, UTC's warning might have led the army to say, "Gee, if this danger (of which we're already aware) is important enough so that UTC decided to warn us of it, we'd better let the pilots

> know about it too." UTC's proposed charge ignores this, as well as other, similar, possibilities. *Id.*, at 73.

In the complete absence of any proof that Defendants were prohibited by the U.S. Navy from providing warnings of the failures and defects of the external cargo carrying system, or from providing procedures for emergency release or safe flight during an emergency, Defendants clearly were not entitled to summary judgment on their military contractors defense as against Plaintiffs' claims for failure to warn.

It bears emphasis that Petitioners' witnesses included a former helicopter pilot and long-term Sikorsky employee who confirmed that, despite Defendants' unsupported claims to the contrary, Sikorsky wrote the flight training manual for the Government.

The New York State Courts' departure from the mandates of this Court's decisional law, and the decisions of the United States Court of Appeals for the Second Circuit, not only permit and encourage the appellate jurisdiction of this Court, but necessitate such corrective action.

CONCLUSION

It is respectfully requested that this Petition for a Writ of Certiorari be granted and that this Court exercise its jurisdiction.

Respectfully submitted,

Paul C. Matthews, Esq.
Counsel of Record
54 Stone Street
New York, New York 10004
(212) 344-1936
Attorney for Petitioners

(Any footnotes trail end of each document)
State of New York, Court of Appeals

Julio Cesar Wilson Stajano, et al.,
Appellants,

v.

United Technologies Corporation, et al.,
Respondents.

3 N.Y.3d 736, --- N.E.2d ---

October 26, 2004

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that said motion, insofar as it seeks leave to appeal from that part of the March 2004 Appellate Division order that affirmed the dismissal of appellants' complaint, be and the same hereby is denied; and it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the remainder of that order and from the July 2004 Appellate Division order denying reargument or, in the alternative, leave to appeal to this Court, be and the same hereby is dismissed upon the ground that the remainder of the March 2004 Appellate Division order and the July 2004 order o not finally determine the action within the meaning of the Constitution.

Supreme Court of the State of New York,
Appellate Division,
First Judicial Department

Julio Cesar Wilson Stajano, et al.,
Plaintiffs-Appellants,

v.

United Technologies Corporation, et al.,
Defendants-Respondents.

July 1, 2004

Plaintiffs-appellants having moved, by separate motions, for reargument (M-1886) of or, in the alternative, for leave to appeal to the Court of Appeals (M-1977) from the decision and order of this Court entered on March 23, 2004 (Appeal Nos. 3205, 3206, 3207 & 3208),

Now, upon reading and filing the papers with respect to the motions, and due deliberation having been had thereon,

It is ordered that the motions are denied.

Supreme Court of the State of New York,
Appellate Division,
First Department

Julio Cesar Wilson Stajano et al.,
Plaintiffs-Appellants

v.

United Technologies Corporation et al.,
Defendants-Respondents.

March 23, 2004

5 A.D.3d 260, 774 N.Y.S.2d 490

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about October 22, 2002, which, in granting defendants leave to amend their answers, nunc pro tunc, to include government-contractor defenses, further granted defendants' motion for summary judgment dismissing the action in its entirety, and denied, as academic, all pending motions and cross motions, and order, same court and Justice, entered March 13, 2003, which, to the extent appealable, denied plaintiffs' motion for renewal, unanimously affirmed, without costs. Appeal from order, same court and Justice, dated August 22, 2002, which denied, with leave to renew, plaintiffs' motion for an order granting open commissions to depose defendants' former employees, and failed to dispose of defendants' cross motion to strike extraneous matter from the record, and their motion to amend and for summary judgment, unanimously dismissed, without costs.

A prior motion for summary judgment was premature, given that disclosure had not yet been completed (see 273 A.D.2d 162 [2000]). Having now obtained the materials necessary to resolve previously open questions of fact, defendants' motion for summary judgment, based on a more detailed government-contractor defense, was appropriate.

Plaintiffs were not prejudiced by the grant of leave for defendants to amend their answer, inasmuch as the former has been on notice, for more than 10 years, that leave was previously granted to assert a more particularized affirmative defense on whether the helicopters in question conformed to government specifications and whether modification or alterations had been made in the systems employed. The newly amended affirmative defenses satisfied the three-pronged test of government approval of reasonably precise specifications, conformity to those specifications, and a warning to the government about dangers known to the contractor in the use of the equipment (Boyle v United Tech. Corp., 487 US 500, 512 [1988]). Summary judgment was thus properly granted.

We have considered plaintiffs' remaining contentions and find them to be without merit.

Concur--Buckley, P.J., Tom, Andrias and Gonzalez, JJ.

Supreme Court of the State of New York,
First Judicial Department

Julio Cesar Wilson Stajano et al.,
Plaintiffs,

v.

United Technologies Corporation, et al.,
Defendants.

February 28, 2003

Upon the foregoing papers, it is ordered that this motion by plaintiffs to renew and/or reargue a prior motion, by defendants for, inter alia, summary judgment, and for vacatur of this Court's Order thereon dated October 8, 2002, pursuant to CPLR 2221, 5015(a)(2) and 5015(a)(3), is denied.

Plaintiffs have not established that the Court overlooked or misapprehended either the facts or the law in determining the prior motion. CPLR 2221(d)(2), (f). See Pro Brokerage, Inc. v. Home Ins. Co., 99 A.D.2d 971 (1984). Accordingly that branch of their motion which seeks reargument is denied.

Renewal is also denied, as the allegedly new material submitted on the instant application would not have changed the prior determination. CPLR 2221(e)(2), (f); CPLR 5015(a)(2). Plaintiffs additionally fail to establish that the allegedly "newly discovered" evidence was not in fact available to them on the original application; and they do not proffer a satisfactory excuse for not having submitted the "new" facts sooner. See Guerrero v.

Dublin Up Corp. Of New York, 260 A.D.2d 435 (2nd Dept. 1999); Lee v. Ogden Allied Maintenance Corp., 226 A.D.2d 226, 227 (1st Dept. 1996), appeal dismissed 89 N.Y.2d 916 (1996). Notably, plaintiffs submit an Affidavit, dated December 2, 2002, from one George J. Munkenbeck, Jr., who claims -- on the basis of ill-defined expertise derived from an equally ill-defined professional connection with the U.S. Coast Guard -- to have interpreted a number of government documents from the 1950's -- allegedly only recently de-classified -- to mean, inter alia, that defendants' dat and witness es on their prior application were either mistaken or else were downright fraudulent. CPLR 5015(e). The Court finds neither Mr. Munkenbeck's credentials nor his representations to be convincing.

Shirley Werner Kornreich, J.S.C

Index No. 003052/1980

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 28

JULIO CESAR WILSON STAJANO and ANA MARIA DELGATTE de STAJANO, as parents and natural Guardians of infant Plaintiff CHANTAL DELGATTE STAJANO, and JULIO CESAR WISON STAJANO and ANA MARAI DELGATTE de STAJANO, individually,
Plaintiffs,

-against-

UNITED TECHNOLOGY CORPORATION OF NEW YORK CITY nad UNITED TECHNOLOGIES CORPORATION and SIKORSKY AIRCRAFT, INC.,
Defendants.

DECISION, ORDER and JUDGMENT

KORNREICH, J:

Motion sequence numbers 35, 37 and 38 are herewith consolidated for disposition. fn1

I. BACKGROUND:

In five consolidated actions, plaintiffs Alberto Lopez, Miguel Lopez, Julio Stajano, Robert Tochodjuklian, and Teresa Aparicio fn2 alleged that on November 14, 1971, they were injured when a helicopter - which had been manufactured by the Sikorsky Aircraft division of

defendants United Technologies Corporation of New York City and United Technologies Corporation -- crashed at a waterside air show in Pocitos, Montevideo, Uruguay. The Lopez plaintiffs originally commenced their actions for strict products liability (e.g., defective design, negligent manufacture, and failure to warn) in 1978, and the others in 1980. After many years of pretrial procedural wrangling, the cases were transferred to another jurisdiction. However, Justice Edward Greenfield of the Supreme Court, New York County reinstated them in this Court on February 13, 1990. fn3 Throughout their long history, the actions have been plagued by protracted delays followed by periods of frenetic motion practice -- e.g., applications to strike or amend pleadings, quarrels over discovery, and motions to dismiss or for summary judgment. By November of 1997, all of the cases save the instant Stajano action were resolved. Currently before the Court are: (a) a motion by defendants seeking leave to serve and file a Second Amended Answer (#35); (b) defendants' motion for summary judgment (#35); and (c) a number of discovery-related requests made by plaintiffs (#37 and #38).

A. The Accident:

According to a contemporaneous account of the event published by the local Uruguayan newspaper El Dia, on which plaintiffs rely, the accident came about as follows: Some 5,000 - 10,000 spectators had assembled on a bluff and beach in Pocitos, Montevideo, Uruguay on the afternoon of Sunday, November 14, 1971, to witness an air show being put on by the Uruguayan military. At approximately 5:25 p.m., Uruguayan Navy Captain Waldemar Ferdomo as Pilot, assisted by

Amilcar Gonzalez as Co-Pilot, got into a helicopter ("Helicopter A'), which was parked on the bluff some seven meters above the beach and waters of the Mar del Plata, Beside Helicopter "A" was parked a second helicopter of the same basic design ("Helicopter B"). Both aircraft had been purchased by Uruguay from the U. S. government in 1971. fn4

Perdomo and Gonzalez undertook to demonstrate that Helicopter A could transport a jeep across the water. "For this," the translated El Dia article explains, the pilots' "land helpers placed strong belts to the vehicles sic forming a mooring. This was hung at one of the aircraft's flanks by means of a small crane." For reasons that are not explained, the operation did not run smoothly, and "the pilot had to make several attempts to haul the vehicle up." At length, the "land helpers" managed to secure the "belts" around the jeep in such a way that the helicopter could lift into the air with the jeep "hanging beneath it". fn5

The helicopter with its dangling jeep flew out over the ocean. However, suddenly one of the "belts" booked to the front of the jeep came "unfastened," and the released corner of the vehicle sagged sharply downward. When the jeep became unbalanced, the helicopter's center of gravity shifted and the aircraft began to lose altitude. The pilot headed back to shore, intending, apparently, to land the helicopter near where the flight had originated. However, as Helicopter A, progressively losing altitude, approached the bluff where Helicopter B was still idling, the jeep slammed into the side of the cliff. The impact yanked the helicopter forward and down, causing it to crash onto the top of the still-parked Helicopter B -- with great

force and with its propeller still rotating. The fuel tanks of both aircraft exploded. In the ensuing conflagration, metal projectiles -- e.g., shards of rotor blades, and bullets from the machine Bans that had been inside the two cockpits -- erupted in all directions, dismembering and killing eight people instantly, and injuring 40-100 others. Miraculously, the crew of both aircraft, including Pilot Waldemar Ferdomo and Co-Pilot Amilcar Gonzalez, managed to escape with their lives.

B. Plaintiffs' Theoryof Defendants' Liability:

Plaintiffs, who were children at the -time of this accident, were among the injured. To date, they have not been successfully deposed or medically examined by the defendants. fn6 In addition, plaintiffs' counsel has apparently never interviewed Pilot Perdomo, Co-Pilot Gonzalez, other passengers on Helicopter A (if any), the 'land helpers" who fastened the jeep to the aircraft, personnel on Helicopter B, or any of the spectators -- save one -- at the air show. The sole version of the foregoing events that has been supplied to the defendants and to this Court by plaintiffs is contained in newspaper articles such as the El Dia item summarized above, and in an affidavit from one air show witness, Carlos Tochodjuklian, dated March 1999. Tochodjuklian's account contains no description of how the jeep was attached to the helicopter. His narrative regarding the how the collision came about tracks that of the El Dia journalist, except for the addition of the following sentence at the end of Tochodjuklian's affidavit: "The carrying hook connected to the bottom of the lifting helicopter never opened from the time the helicopter was over the water until the time the jeep struck the rocks."

Plaintiffs' original expert, Robert Nokes, is a retired pilot and vendor of Sikorsky helicopter parts. Nokes drafted several affidavits between December 1998 and May 2002, during the course of which plaintiffs' theory of the accident may be said to have evolved. Briefly, Nokes suggests that the electrical "cargo release" switch on the pilot's and co-pilot's cyclic control sticks "must have" malfunctioned ("manufacturing defect #1"); that the back-up mechanical cargo release pedal on the cockpit floor next to the pilot's right foot "must have" failed as well ("manufacturing defect #2"), and that the design of the aircraft was defective because there was no redundant "foot pedal" close to the co-pilot by means of which the jeep could have been jettisoned ("design defect #1"). A comprehensive exposition of plaintiffs' basic theory of defendants' liability is supplied by Nokes on (unnumbered) pages 3-4 of his Affidavit dated March 29, 1999, as follows:

Helicopter pilots receive a great deal of instruction in carrying external loads. Part of this instruction includes the drumming into them that if anything goes wrong while carrying an external load, the first thing they are to do is to release the load. This is called 'pickle the load.' Instructors emphasize the fact that no load is worth endangering the aircraft.

If one of the straps holding the Jeep came loose, as it appears in the photographs, this instability would immediately be noticed by the pilot. He would feel a 'jerk' throughout the aircraft when the strap carne loose. The photos I examined clearly show the load tilting downward. The pilot, by reflex, would immediately attempt to 'pickle' (release) the load by means of the electrical release button located on his

control stick. Upon realization this action did not in fact release the load, he would have to have the co-pilot take control of the pedals, while he attempted to mechanically release the load utilizing the emergency load release pedal located on the floor to his right. In order to accomplish this maneuver, he must take his feet off the control pedals. The emergency release is a vertically operated, spring loaded device. located on the right side of the cockpit floor and must be activated by the pilot's right foot.

It is logical to assume that the electrical and mechanical release mechanisms failed on this aircraft.

Both pilot and co-pilot have electrical release capability so both would automatically use their reflex actions to attempt to release the load. However, in this model helicopter only one emergency mechanical release is available. This is located on the floor to the right of the pilot. The co-pilot cannot avail himself of this release mechanism. He is completely blocked from using it by the center console.

One can conclude that this equipment failed to function by reason of a manufacturing defect, a design defect, or both. This model helicopter is designed without a dual [mechanical] emergency release system There is no other emergency or fail-safe method of opening the cargo book under the conditions described (emphases supplied).

C. Discovery regarding inter alia, the helicopter' design:

After twice having had their Note of Issue stricken for

failure to complete discovery, on February 16, 2000, plaintiffs filed a third Note of Issue, in accordance with an oral Order of Justice Schoenfeld, issued in chambers on February 9, 2000, allowing discovery to continue while the case remained on the trial calendar. Defendants again moved to strike and for assorted other relief, while plaintiffs cross-moved to preclude, to compel defendants to produce a witness with knowledge for deposition, and for depositions of certain out-of-state witnesses -- among other things.

In his 28-page Order dated January 11, 2001, Justice Schoenfeld formally allowed discovery to continue while the case remained on the trial calendar. The Court did direct, however, that all discovery had to be concluded by March 9, 2001, including, inter alia , depositions and physical examinations of the plaintiffs in New York City; Mr. Heller's depositions of two out-of-state witnesses who were allegedly knowledgeable about defendants' helicopters (depositions which in fact the Court had already authorized in a prior Order dated January 4, 2000, but which Mr. Heller had never set up); and a deposition of a party witness for defendants - to the extent possible, a person "with knowledge" "of the HSS-1's design, manufacture, maintenance, sales, servicing, repair and alteration to cargo lifting capabilities."

Mr. Heller once again failed to make the necessary arrangements to depose the two out-of-state witnesses. The fiasco attending the depositions and medical examinations of the plaintiffs in March-May 2001 has already been described in footnote 6, above. Finally, defendant's witness -- retired Professional Engineer Leon Jacobson, who had worked for Sikorsky between

1953 and 1990, as, inter alia, its Director of Aircraft Design - was produced for deposition on January 25 and 26, 2001. When the deposition broke off at 4:50 p.m. on the second day, Mr. Heller announced that he did not consider the EBT of Jacobson to be concluded. Nevertheless, Mr. Heller did not thereafter schedule its resumption; and he did not respond to defendants' counsel's letter of February 7, 2001 offering to produce Mr. Jacobson to complete his deposition before the Court's March 9, 2001 deadline.

Defendants have now supplied a comprehensive dossier of printed materials, documenting the evolution of the subject helicopter's design. As a guide to these materials, Leon Jacobson has presented a 30-page Affidavit, dated July 18, 2001. Plaintiffs in the meantime have also retained an engineering expert, one Robert J. Waldron, Ph.D., a metallurgist who specializes in the investigation of aircraft accidents -- particularly ones involving helicopters. Dr. Waldron has submitted a 9-page affidavit, dated November 16, 2001, in which he basically subscribes to Mr. Nokes's theory of the case -- viz., that both the electrical and mechanical cargo release systems "must have" malfunctioned in Ferdomo's helicopter, and that the release system in the aircraft had been badly designed, inter alia, for failing to have a redundant foot pedal on the co-pilot's side of the cockpit.

Mr. Jacobson and Dr. Waldron are in agreement regarding the evolution of the subject helicopter, which Dr. Waldron characterizes as "the military helicopter identified as BUNO 143941." The prototype, denominated XHSS-1, was conceived by Sikorsky Aircraft in or around 1952 as a military aircraft

designed to assist in anti-submarine warfare. During the 1959s and thereafter, the U.S. Navy operated a Bureau of Naval Weapons Office ("BNWO") on the Connecticut premises of Sikorsky Aircraft, under the supervision of a civilian engineer named Leo Miller. Miller and ten other BNWO engineers worked closely with Sikorsky Aircraft engineers to ensure that the company's helicopter configurations conformed with the government's various aircraft detail specifications. This was necessary, inter alia, because the XHSS-1 family of helicopters was intended to be launched from Navy cruisers and carriers, for the purpose of, inter alia, seeking out and/or attacking enemy submarines.

Among the "offspring" of the XHSS-1 were the HUS-1 and the HSS-1. The HUS-1 model came equipped with an external cargo carrying sling, a sling installation, a cargo hook with an automatic load release (i.e., that would release the cargo when it touched the ground), and normal and emergency release controls inside the cockpit. The U.S. Navy Detail Specifications that Sikorsky was to follow in creating the Model HUS-1 helicopter fill 150 pages.

The HSS-1 model at issue here, however, was a variant of the HUS-1. It was designed to carry two pilots and two sonar operators if sent out on a "search," or two crewmen and two MK 43 torpedoes if dispatched to "attack." Unlike the HUS-1, the HSS-1 did not have an external cargo-carrying sling. Rather, with respect to the HSS-1, the U.S. Navy's Detail Specifications required only that "strength" would be provided in the fuselage in order to permit the possible future installation of a cargo sling. To quote plaintiffs' engineering expert, Dr. Waldron:

The accident helicopter (BUNO 143941) was delivered to the U S. Navy as a Model HSS-1 helicopter. The first HSS-1 helicopter was delivered to the U.S. Navy in March 1955. BUNO 143941 was delivered on December 9, 1957. The primary mission of the Model HSS-1 was as an anti-submarine search and-attack., helicopter.

The HSS-1 model (including BUNO 143941) was not delivered to the U.S. Navy equipped with an external sling assembly. However, the design requirement specification . . . did include [that] ... '[s]trength shall be provided in the fuselage structure for the possible future installation of a cargo sling capable of carrying 4000 pounds external load [later upgraded to 5000 pounds] fn7

When, on December 9, 1957, Sikorsky Aircraft delivered the instant HSS; 1 BUNO 143941 to the Navy, the U.S. Navy inspector accepting shipment signed a document ("Form DD 250") certifying that the aircraft conformed to the government's contract specifications (ie., the design dictated in "U.S.N. Detail Spec. SD-493-1-1 dated 26 April 1956"). See Exhibit 6 to Jacobson Affidavit. Before the government received the instant HSS-1, it had already taken delivery of 184 similar HSS- l's produced by Sikorsky Aircraft, and would subsequently take delivery of an additional 30.

It is not disputed that after the BUNO 143941 was delivered by defendants to the U.S.Navy on December 9, 1957, it was never returned to any Sikorsky Aircraft plant for any reason at any time. Rather, BUNO 143941 remained in the service of the U.S. Navy for the next 13 years, during which period the Navy modified and renamed BUNO 143941 several times before retiring it

in 1970.

Of relevance to this lawsuit is the 1964-1966 conversion of the BUNO 143941 into an external cargo-carrying UH-34J. In the words of plaintiffs' expert, Dr. Waldron: "On December 5, 1964, BUNO 143941 was designated as a Model UH-34J. Conversion to a Model UH-34J included installation of an external cargo sling assembly which the HSS-1 was originally designed to accommodate." The modification was performed by Navy engineers, using Sikorsky-supplied drawings and parts which had previously been approved by the U.S. Navy for use in the Sikorsky HUS-1. The conversion included the U.S. Navy's own "Cargo Hooks Parts Kit," consisting of, inter alia, a "Cargo Release Hook" manufactured by Eastern Rotorcraft Corp. of Willow Grove, Pennsylvania. Defendants admit that Sikorsky had supplied the original drawing on which Eastern Rotorcraft cargo release hook was based. However, BNWO.had approved all of Sikorsky's drawings, and had similarly approved Eastern Rotorcraft's execution of the Sikorsky design. Indeed, the documentary evidence reflects that the Navy was aware of an alternative design which would have provided for a "dual" mechanical cargo release on the co-pilot's side of the cockpit, but expressly rejected it.

The BUNO 143941 was retired from Navy service in 1970 and sold to the Uruguayan govemment in 1971. By 1975, 830 Sikorsky helicopters were in the air around the world and, according to Mr. Jacobson's researches, not one of them had occasioned any report or complaint regarding "any incident or accident caused by the failure of any external cargo load from any helicopter."

II. DISCUSSION:

A. Defendants' Motion or Leave to Amend their Answer:

In Motion #35, defendants seek an order granting them leave to serve and file a Second Amended Answer adding two new "federal government contractor" and "contract specification" defenses, and granting them summary judgment dismissing plaintiffs' design defect, manufacturing defect and failure to warn claims. Plaintiffs have "cross-moved" to deny defendants' application, and for an order dismissing all of defendants' "military contractor defenses."

Defendants originally moved in 1992 to add as an eighth affirmative defense a claim that plaintiffs' action was barred by "the government contractor defense." In its Order dated March 24, 1992, the Court granted defendants' motion- although it instructed them to more specifically elaborate the new defense in their Amended answer, in light of the fact that plaintiffs' current theory of liability was that "the lifting mechanism with which the helicopters were equipped was [somehow] defective." Accordingly, the eighth Affirmative Defense in defendants' Amended Complaint, served on September 15, 1992, recited that the BUNO 143941 that Sikorsky had delivered to the U.S. Navy on December 9, 1957 conformed in all respects to the Navy's specifications, and was certified to be in compliance by the government official who had accepted delivery of the aircraft. Affirmative Defense #8 went on to allege that at no time subsequent to delivery did Sikorsky make any modifications to the aircraft; that at no time was it aware of any dangers

attending its use that were unknown to the U.S. Navy; and that plaintiffs' lawsuits were barred in consequence.

In proposed Affirmative Defense #9, defendants underscore that they are similarly not liable for the U.S. Navy's 19641966 conversion of the BUNO from a non-cargo-carrying SH-34J helicopter into a cargo-carrying UH-341 model, because the conversion was accomplished by the Navy in accordance with government specifications. Moreover, in Proposed Affirmative Defense #10, defendants contend that to the extent that the original design and subsequent conversion were accomplished using Sikorsky drawings and/or equipment, Sikorsky is without liability because all such "drawings and/or equipment are [similarly] covered by the federal government contractor defense and the contract specification defense."

It is well established that "[a] party may amend his pleading ... at any time by leave of court ... Leave shall be freely given upon such terms as may be just ...." CPLR 3025. While "lateness" can pose an impediment to amendment, to defeat amendment the "lateness" must cause "significant prejudice" to the opposing party. See Abdelnabi v. New York City Transit Authority, 273 A.D.2d 114 (1st Dept. 2000); Prote Contracting Co.. Inc. v. Board of Education of the City of New York, 249 A.D.2d 178 (1st Dept. 1998).

Plaintiffs complain of the passage of more than 30 years since the happening of the within accident. However, the Court notes that the majority of the delays in the instant litigation are attributable to plaintiffs' counsel's tactics. For example, it was not until 1998 that plaintiffs

began to narrow their theory of the case to "something wrong with the cargo release system," with the result that defendants were perforce delayed in articulating the details of their defense. In addition, the basic general "federal government contractor" defense was interposed in 1992, so that plaintiffs have been aware of the theory for ten years. The amendments proposed here merely amplify this original "contract specification defense," extending to the helicopter's subsequent modification the basic principle that when the government or a private person retains control over a product's final design and manufacture, then the contractor is not responsible to third parties for the purchaser's choices - unless the plans and specifications are so apparently defective that a contractor of ordinary prudence would be put on notice that they were likely to cause injury. See, e.g., Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

Since plaintiffs have not demonstrated how they are prejudiced or surprised by the proposed amendments, defendants' motion is granted to the extent that their answer is deemed to interpose Affirmative Defenses #9 and #10, nunc pro tunc.

Also granted is defendants' application to correct paragraph 2 of their answer. As is apparent from documentation served upon the plaintiffs in 1998, the BUNO 143941 that defendants delivered to the U.S. Navy on December 9, 1957 was a model HSS-1, not an H-34.

B. Defendants' Motion for Summary Judgment.

1) Threshold issues:

Plaintiffs protest that defendants' summary judgment motion should be denied because it was served more than 120 days after they filed their (third) Note of Issue on February 16, 2000. CPLR 3212(a).

As a threshold matter, the 120-day limit was enacted to discourage "the practice of 'eleventh hour' summary judgment motions" made on the eve of trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 128-129 (2000); Cibener v. City of New York, 268 A.D.2d 334 (1st Dept. 2000). Here, a trial is not imminent, as "discovery" has been continuing notwithstanding the filing of a Note of Issue. See Gonzalez v. Mag Leasing Corp., supra Accordingly, the policy that prompted the enactment of the 120-day time limitation is not at issue.

Moreover, the Court has authority to permit a party to serve a motion for summary judgment more than 120 days after the filing of a Note of Issue when "good cause" is shown for tardiness in bringing the motion. See, Luciano v. Apple Maintenance Services Inc., 289 A.D.2d 90 (1st Dept. 2001); CPLR 3212 (a). The court's discretion in determining adequate cause is broad, and it may extend the time period to permit a belated but meritorious motion in the interest of judicial economy where the opposing party has not manifested any prejudice. McKay v. Ciani, 280 A.D.2d 808, 809 (3rd Dept. 2001), leave denied 96 N.Y.2d 713 (2001). As has been repeatedly emphasized, a motion for summary judgment should not be denied on technical grounds without regard to the merits of the application. See Milne v. Cheema, 270 A.D.2d 165 (1" Dept. 2000). As will be discussed below, defendants' application is meritorious, and plaintiffs have failed to present any evidence raising a triable issue of fact as to their

entitlement to judgment as a matter of law. Further, plaintiffs have not indicated how they are prejudiced by the delay. Accordingly, the Court rules, in an exercise of its discretion, that the instant summary judgment motion is not "too late" even though served more than 120 days after plaintiffs' filing of a Note of Issue.

Nor is defendants' motion "premature" because of "incomplete discovery" - plaintiffs' alternative argument. The Court notes that according to Justice Schoenfeld's Order of January 11, 2001, all discovery was required to be concluded by March 9, 2001. The record currently before the Court is now complete with regard to: (a) the details of BUNO 143941's design, pans and equipment when Sikorsky Aircraft delivered it to the U.S. Navy in 1957 as an HSS-1; (b) the subsequent U.S. Navy operational and modification history of BUNO 143941; and (c) the origin, character, design and components of the exterior cargo carrying system and hook installed in the subject aircraft in 1964-1966. Plaintiffs, in contrast, have failed to adhere to Justice Schoenfeld's discovery schedule, have failed to adduce any cognizable evidence supporting their design defect, manufacturing defect or failure to warn claims, and have failed even to identify what outstanding "discovery" would, at this late date, aid them in refuting defendants' case.

Additionally, defendants are not barred from moving for summary judgment on the ground that they have made a prior unsuccessful motion for this relief. Voluminous materials have been submitted on the instant motion which satisfactorily resolve a number of factual questions that remained unsettled at the time of defendants' prior application. See Sansol Indus., Inc. v.

345 East 56th Street Owners, Inc.,276 A.D.2d 370 (1" Dept. 2000); Freeze Right Refrigeration and Air Conditioning Services. Inc, v. City of New York, 101 A.D.2d 175 (1st Dept. 1984). For example, when it affirmed the denial of defendants' prior motion. for summary judgment in June of 2000, the First Department noted that "disclosure on the issues of design[, installation] and manufacture [of the helicopter's external cargo carrying system] is incomplete" Stajano v. United Technologies Corp. of New York, 273 A.Md 162 (1st Dept. 2000). The record is now replete with evidence as to how the accident helicopter and its external cargo carrier were designed, manufactured and installed. Finally, the instant summary judgment application is based on a legal theory ("contract specification defense") different from the one advanced on the prior summary judgment motion ("causation"). See Santini v. Alexander Grant, Inc., 272 AD.2d 271 (1st Dept. 2000).

2) Substantive issues:

In Boyle v. United Technologies Corp., supra, the U.S. Supreme Court held that a court could not impose tort liability on a U.S. government contractor for design defects in military equipment pursuant to state law where (1) the United States had approved reasonably precise specifications for the equipment; (2) the equipment conformed to those specifications; and (3) the contractor warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The "government contractor immunity" defense is derived from the government's immunity from suit where the performance of a discretionary function is at issue.

Boyle, supra at 511. The selection of an appropriate design for military equipment for use by the Armed Forces has been identified as a quintessentially discretionary function.

Boyle Prong #1: "Reasonably precise specifications approved by the government" (plaintiffs' "design defect" theory):

The government need not itself have prepared the challenged equipment's specifications to be considered to have approved them. See Trevino v. General Dynamics, 865 F.2d 1474, 1480 (5th Cir. 1989), cert. denied 493 U.S. 935 (1989) ("substantive review" of technology by government sufficient to trigger defense). In this case, however, it is clear from defendants' submissions -- and, indeed, it is equally clear from plaintiffs' submissions -- that the U.S. Navy approved reasonably precise specifications for the original BUNO 143941 helicopter that it accepted in 1957, and that it was the U.S. Navy which decided upon the design of the external cargo sling and hook assembly that was installed in 1964-1966.

That the government did not merely "review," but rather actively participated in the original design and construction of the aircraft as a whole is evidenced by the existence of elaborate Navy Detail Specification manuals that the contractor was obliged to follow in creating its series of submarine-tracking helicopters during the 1950's. Government participation in the design phase of the aircraft's engineering also is apparent from the active, on-site involvement of engineers like Leo Miller of the Navy's Bureau of Naval Weapons Office during the early years of the

helicopter's development. See In Re Air Disaster a Ramstein Air Base Germany on August 29, 19 , 81 F.3d 570 (5th Cir. 1996), cert. denied 519 U.S. 1028 (1996). Defendants have thus demonstrated that this is not merely a case where the U.S. government simply and without more "rubber stamped" a drawing submitted to it by the contractor. Cf. Snell v. Bell Helicopter Inc., 107 F.3d 744 (9th Cir. 1997); Trevino v. General Dynamics, supra, cert.denied 493 U.S. (1989).

Plaintiffs' counsel's objection that the basic design was Sikorsky's, and that components of the helicopter still bear Sikorsky decals or "proprietary certificates," overlooks the fact that military hardware does not suddenly spring into being from initial design and procurement specifications, but evolves through drawings, blueprints and mockups agreed upon by the parties. The ultimate design of the product is determined not only by the original procurement and contract specifications, but also by specific quantitative engineering analysis developed during the actual production process. *** The Navy reserved the right to reject drawings and to require revisions and modifications. Tbese working drawings, and not simply the general qualitative specifications from the procurement stage, comprise 'the reasonably precise specifications' contemplated by Boyle....

Kleeman v. McDonnell Douglas Corp., 890 F.2d 698 (4th Cir. 1.989). In other words, a design may have both started out and ended up with a "Sikorsky" proprietary designation, but may have undergone numerous modifications dictated by Navy engineers along the way.

The Boyle Court expressly rejected another, related theory relied on by plaintiffs, namely, that liability might attach depending on how much of a design was ultimately traceable to the contractor versus how much was dictated by the government. Id. at 513. Rather, according to Boyle, a contractor will be completely immunized in all instances where the government actually participated in discretionary design decisions affecting the choice of technology either by designing the product itself, or by approving the specifications prepared by the contractor. See also Harduvel v. General Dynamics Corp., 878 F.2d 1311, 1315 (11th Cir. 1989), cert. denied 494 U.S. 1030 (1990; cf. Shaw v. Gruman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), cert. denied 487 U.S. 1233 (1988), overruled by Boyle, supra.

In an alternative argument, plaintiffs' counsel devotes many pages of his attorney's affirmation in support of his clients' "cross-motion" to an exposition of the theory, apparently of his own devising, that the BUNO 143941 is "descended" from an original "civilian' S-58 helicopter dating from 1952, with the result that the "government contractor" defense is inapplicable. Aside from the fact that there is no expert affirmation supporting this contention, it appears from, inter alia, the "helicopter genealogy" that counsel appends to his "cross-motion" papers (the authenticity of which is unclear) that "S-58" was originally the generic designation of a whole family of (mostly military) helicopters, including the HSS-1. The "genealogy" reflects that a specific cargo-carrying "S-58," which might or might not be a civilian aircraft, was a cousin and not a direct progenitor of the XHSS-1. The XHSS-1 was the father or grandfather of the HSS-1 at issue

here. See Plaintiffs' Exhibit 11. It is worthy of note that nowhere in the Report of plaintiffs' engineering expert, Dr. Waldron, is such a theory supported. Instead, Dr. Waldron expressly refers to the subject BUNO 143941 throughout his discussion of it as a "military helicopter." Indeed, Dr. Waldron relates on page 3 of his November 16, 2001 "Report" that

U.S. Federal Aviation Administration (FAA) documents verify that the models HSS-1 and UH-34J are the same basic helicopter. Surplus military helicopters such as the HSS-I can be certified by the FAA and enter the commercial market. The FAA Helicopter Specification No. 1H11 ... includes a list of military models which are eligible for certification as a civil model. Both the HSS-1 (original delivery configuration of BUNO 143941) and the UH-34J (final 'modified' configuration) are eligible to be certified as the same civil. model, i.e., the S-58B.

In any event, even if it were true that the subject military helicopter had evolved from an earlier civilian prototype, this would not alter the fact that, after years of engineering "give and take" with the Navy, Sikorsky's final product incorporated Navy specifications.

Accordingly, it is clear from all of the evidence summarized above that defendants have satisfied prong #1 of the Boyle test, in that they have demonstrated that the government promulgated "reasonably precise specifications" for the design of the subject aircraft as well as for the later-installed external cargo harness and hook, both by actively engaging in the development process and in "substantively reviewing" the finished

product.

Boyle prong #2: "The equipment conformed to the specifications" plan manufacturing defect" theory):

As was held in Kerstetter, supra, a plaintiff claiming injury due to a product's nonconformance with a government specification must allege more than that the ultimate design feature does not achieve its intended goal. The complained-of "manufacturing defect" must exist independently of the design itself, and must result from a deviation from the required military specifications. Extensive government involvement in the design, review, development and testing of a product, as well as extensive acceptance and use of the product following production, is evidence that the product line generally conformed with the government-approved specifications. See In Re Air Disaster at Ramstein Air Base. Germany, on August 29. 1990, supra.

The Navy's issuance to Sikorsky of its DD 250 form officially accepting the original aircraft on December 9, 1957 constitutes evidence that the BUNO 14291 conformed to the government's specifications. See Harduvel v. General Dynamics Com, supra; Hendrix v. Bell Helicopter Textron, Inc., 634 F.Supp. 1551 (N.D. Tex. 1986) (issuance by government of DD250 acceptance "conclusively established" that helicopter conformed to contract specifications). Moreover, the fact that the U.S. government operated HSS-1 aircraft, as well as HUS-1 and UH- 34J equipment -- all of which were essentially identical to the BUNO 143941 at issue here -- for more than a decade before the happening of this accident serves to establish, without more, that the

Sikorsky equipment conformed to specifications, and that the government was as aware of any difficulties with the aircraft as Sikorsky was. See Smith v. Xerox Corp., 866 F.2d 135 (5th Cir. 1989) (government's acceptance and extended use of product establishes product's conformity with government specifications). Finally, as indicated, in 1964-1966 U.S. Navy engineers selected the external cargo sling assembly design for the: subject BUNO 143941, installed it themselves, and operated the modified aircraft in the field for many years before the happening of this accident. The defendants therefore have satisfied the second prong of the Boyle test, in that all of the evidence in the record supports the conclusion that the helicopter, as modified, conformed to government specifications.

In a case like this one, where a "federal government contract" defense is legitimately raised, Prong #2 of the Boyle inquiry replaces conventional State. law product liability analysis usually applied to "manufacturing defect" claims. However, the reasoning is analogous. Indeed, even if State law were to be applied, plaintiffs have failed to articulate any facts or submit any evidence tending to prove that BUNO 143941 suffered from any manufacturing defects attributable to defendants. In other words, there has been no proof that Sikorsky failed to manufacture its helicopter in conformity with its approved design, or that its subsequentlyinstalled external cargo components were irregular -- in the absence of which there can be no claim of a manufacturing defect, even under State law. See Lombard v. Centrico, Inc., 161 A.D.2d 1071 (3rd Dept. 1990); Shelden v. Hample Equip., Co., 89 A.D.2d 766 (3rd Dept. 1982), aff'd 59 N.Y.2d 618 (1983) ("since there was no direct proof of any defect in the [appliance

that injured plaintiff], plaintiff was required to exclude all causes of the. accident not attributable to defendants"). A manufacturing defect cannot be inferred where the evidence is equally consistent with nonliability as with liability. Sheldon, supra.

Boyle prong #3; "Contractor's duty to warn government about dangers not known to the government (plaintiffs' "failure to warn" theory):

As Boyle makes clear, a military contractor is obliged to warn only the U.S. government about those equipment dangers that are known to the contractor but not to the government. See Kerstetter v. Pacific Scientific Co., 210 F.3d 431 (5th Cir., 2000), cert. denied 531 U.S. 919 (2000); Tate v. Boeing Helicopters, 140 F.3d 654 (6th Cir. 1998) ("Tate II"); Tate v. Boeing Helicopters, 55 F.3d 1150 (6th Cir. 1995) ("Tate I"); Trevino v. General Dynamics Corp., supra. Such a contractor has no obligation to "warn" remote, third-party users.

In addition, a contractor can satisfy prong #3 of the Boyle test if it shows that it had no "actual" knowledge of the alleged design defect that purportedly caused an accident. That is, a contractor is immunized from state tort liability even in cases where it did not warn of a latent defect that neither it nor the government considered at all during the design and manufacturing process. Kerstetter v. Pacific Scientific Co., supra. Here, defendants have produced uncontradicted evidence that Sikorsky had no record of any complaints about the cargo-releasing mechanism at issue, and so had no knowledge of any peril about which it should have alerted the U.S. Navy.

Plaintiffs argue that defendants fail to satisfy prong #3 of the Boyle test in that Sikorsky knew or had reason to know that the failure to incorporate a redundant mechanical cargo release at the co-pilot's foot would prove dangerous when the crew needed to jettison external cargo during an emergency, when the pilot would foreseeably be preoccupied with more pressing matters. It is plaintiffs' contention that the omission of this second foot pedal constitutes a "design defect," and that Sikorsky's failure to bring it to the U.S. Navy's attention amounts to concealment of a danger known to the supplier but not to the United States. However, as related above, when the Navy undertook to install an external cargo sling assembly on the BUNO 143941 in 1964-1966, it expressly rejected a design that would have included a co-pilot's-side foot-pedal cargo-release. Had the absence of this co-pilot's side foot pedal posed an actual danger, it is reasonable to assume that the Navy would have become aware of it during the several years that it used the modified helicopter before retiring it. See In Re Air Disaster at Ramstein Air Base. Germany, on August 29. 1990, supra; Zinck v. ITT Corp., 690 F.Supp. 1331 (S.D.N.Y. 1988). Plaintiffs have accordingly failed to show that the helicopter or its cargo-releasing mechanism suffered from any "actual" problems that were known to the manufacturer but not to the United States.

Conclusion:

Defendants are entitled to dismissal of all of plaintiffs' design defect claims, since they have demonstrated without serious opposition that they manufactured and delivered a product that was designed in accordance with "reasonably precise" government specifications.

They are also entitled to dismissal of plaintiffs' "manufacturing defect" claims, because the U.S. Navy certified that the product met with its requirements upon accepting it, and the Navy thereafter modified the helicopter in accordance with its own plans and designs. Finally, defendants have demonstrated their entitlement to dismissal of plaintiffs' "failure to warn" claims, by showing that the contractor did not fail to alert the United States about dangers in the design and/or use of the equipment that were known to it but not to the United States. See Beckles v. General Electric Co., 248 A.D.2d 575 (2nd Dept. 1998), leave denied 92 N.Y.2d 805 (1998). fn8

Accordingly, it is

ORDERED that that branch of defendants' motion which seeks leave to amend their answers herein is granted, and the amended answers in the proposed form annexed to the moving papers shall be deemed served nunc pro tunc upon service of a copy of this order with notice of entry; and it is further

ORDERED that that branch of defendants' motion which seeks summary judgment on the basis of their government contractor defenses is granted, and the complaints are dismissed in their entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that all other motions and cross-motions pending before the Court in these actions are denied as academic fn9; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: October 8, 2002
New York, New York

SHIRLEY WERNER KORNREICH

Footnotes

fn1 Motion sequence numbers 28, 29, 30, 32 and 33 are not addressed herein. Those motions are still pending before Justice Martin Schoenfeld, the Judge previously assigned to these cases.

fn2 By order dated August 20, 1997, the following actions were consolidated: 7469/78 (Alberto Lopez); 7473/78 (Miguel Lopez); 3052/80 (Stajano); 3051/80 (Tochodjuklian); and 3595/80 (Aparicio).

fn3 The early procedural history of these cases can be gleaned from Cappellini v. United Technology of New York, 79 A.D.2d 593 (1st Dept. 1980) (conditionally dismissing actions and allowing them to be instituted in Uruguay or Connecticut) and Cesa. v. United Technology of of New York, 148 Misc.2d 918 (Sup. Ct., N.Y. County 1990), aff'd 173 A.D.2d 394 (1st Dept.1991) (reinstating the actions in New York).

fn4 The two helicopters have numerous model and serial numbers, based on who is doing the designating. Both are considered Model S-58 by civilian authorities; H-34A by the United States Army; H-34 by the U.S. Air Force; HSS-1 by the U.S. Navy; and HUS-1 by the U.S. Marines. One has, at a minimum, serial numbers

143934 and 58698, while the other has, at a minimum, serial numbers 143941 and 58722. The Uruguayan Navy apparently designated the two craft as A-061 and A-062, respectively. The evolution of the helicopter design at issue here will be discussed in greater detail later in this Decision.

fn5 Plaintiffs' counsel volunteers in an Affirmation dated May 11, 1999 that these "belts" created a species of conventional harness for transporting jeeps over water, which counsel calls a "four-legged type of sling" or a "four-legged bridle." According to counsel, one belt would have been secured to each of the jeep's four quarters, and all four belts would have met for fastening at the "external cargo hook" protruding from the belly of the aircraft. However, aside from plaintiffs' counsel's say-so, and in light of the crew's difficulties in fastening the jeep to the helicopter, there is nothing in the record to support Mr. Heller's conclusion that the operation was a routine securing of a "four-legged bridle" to an "external cargo hook."

fn6 The record reflects that in March-May 2001, several of the plaintiffs traveled to New York to be deposed and to undergo independent physical/psychiatric examinations. However, because of the disruptive behavior of plaintiffs' counsel, Mr. Heller, during these examinations, Justice Schoenfeld appointed Mr. Leslie Lowenstein as a Special Referee to supervise the proceedings. Mr. Lowenstein subsequently submitted a report in which he castigated Mr. Heller for the deliberate campaign of disruption that he had mounted during the examinations of his clients. Mr. Lowenstein related that Mr. Heller relentlessly caviled at questions, interrupted, objected, argued, and threw

temper tantrums, thereby effectively destroying the examiners' ability to conduct their inquiries. In the end, Mr. Lowenstein recommended that Mr. Heller be held in contempt and be sanctioned for, inter alia, "shred[ding] the very fabric of the legal system in which he practices."

fn7 Aside from Mr. Nokes' conjecture in an Affidavit dated November 21, 2001 that "a jeep" usually weighs "approximately 2,200-2,300 pounds," there is no admissible evidence in the record of the actual weight of the jeep involved in the within accident. The jeep and both helicopters were completely destroyed in the accident.

fn8 Parenthetically, it is worthy of note that even without the government contractor defense, plaintiffs have no case. Plaintiffs' entire theory of this case is based upon the unfounded assumption that when one of the "belts" securing the jeep to the helicopter snapped open, the pilot and the co-pilot instinctively resorted to their electrical releases to no avail, and that the pilot then stomped on the mechanical release pedal near his right foot, also without result. On this record, plaintiffs' theory is pure speculation. There is no evidence that the pilot or co-pilot ever attempted to release the jeep and that the "release" systems failed. In fact, there are any number of possibilities for how this accident happened. For example, the Uruguayan pilots might have been poorly trained, might not have known of the existence of the releases, or might have panicked and bailed out of the aircraft before trying them. It is equally possible that the jeep was overweight, or that it was incorrectly secured to the cargo hook, such that no amount of pushing on the "releases" would have

jettisoned the vehicle. Perhaps, too, the helicopter had been poorly maintained during the roughly one year that it was in the possession of the Uruguayan government, so that the "release" and other systems were in disrepair. Finally, even assuming that the release systems malfunctioned, the plaintiffs do not explain how or why the co-pilot's footpedal, had one existed, would have survived the shut-down. Accordingly, plaintiffs' theory that a second foot-pedal near the co-pilot's seat would somehow have saved the day, and that its absence constituted an "inherently dangerous" design defect, is little more than fanciful conjecture.

The lack of evidence on these critical issues is entirely attributable to plaintiffs. That is, plaintiffs' counsel has over all these years failed to, inter alia, obtain statements regarding what went on in the cockpit from the Pilot and the Co-Pilot- both of whom survived the crash; failed to obtain from them, or indeed from anybody, a precise descripton of the arrangement of. switches and dials in the cockpit, which Mr. Heller conclusorily insists was "confusing" and therefore "defective"; failed to interview the "ground crew" who fastened the jeep to the helicopter; failed to provide evidence of the pilot's and co-pilot's training; and failed to unearth witnesses to the weight of the jeep and the maintenance of the aircraft.

fn9 The Court has considered but declines to address, as moot, the remaining arguments raised by plaintiffs on these motions.

Supreme Court of the State of New York,
Appellate Division,
First Judicial Department

Julio Cesar Wilson Stajano et al.,
Plaintiffs-Respondents-Appellants,

v.

United Technologies Corporation, et al.,
Defendants-Appellants-Respondents.

June 27, 2000

273 A.D.2d 162, 711 N.Y.S.2d 718

Order, Supreme Court, New York County (Martin Schoenfeld, J.), entered on or about January 7, 2000, which, in an action for personal injuries allegedly caused by defects in a helicopter designed and manufactured by defendants, inter alia, denied the parties' respective motions for summary judgment, unanimously affirmed, without costs.

Defendants' motion for summary judgment was properly denied since they failed to come forward with evidence of causation eliminating the possibility that the accident was caused by a design or manufacturing defect in the helicopter's external cargo carrying system (see, Winegrad v New York Univ. Medical Center, 64 N.Y.2d 851, 853). We would also note that disclosure on the issues of design and manufacture is incomplete. With respect to plaintiffs, cross motion for summary judgment, numerous issues of fact remain unresolved, including, most significantly, whether

defendants designed, manufactured and installed the allegedly defective cargo carrying system. On the issue of the applicability of general maritime law, previously left unresolved by this Court (258 A.D.2d 424), while plaintiffs have submitted additional competent and undisputed evidence that the accident began over water, they still have not established a "maritime nexus" sufficiently to warrant a ruling. Factual issues continue to exist as to whether the subject helicopter was designed to perform, and in fact at the time of the accident was performing, an activity traditionally performed by waterborne vessels (see, O'Hara v Bayliner, 89 N.Y.2d 636, 641-644, cert denied 522 U.S. 822). We have considered plaintiffs, other arguments and find them to be unavailing.

Rosenberger, J.P., Nardelli, Mazzarelli, Wallach, Lerner, JJ., concur.

Supreme Court of the State of New York,
First Judicial Department

Julio Cesar Wilson Stajano et al.,
Plaintiffs,

v.

United Technologies Corporation of
New York City, et al., Defendants.

January 4, 2000

MARTIN SCHOENFELD, J.:

The motions designated by sequence numbers 23, 24, and 25 are consolidated and disposed of as follows:

In these consolidated actions plaintiffs Alberto Lopez, Miguel Lopez, Julio Stajano, Robert Tochodjuklian, and Teresa Aparicio fn1 allege that on November 14, 1971, they were injured when two helicopters fn2 manufactured by the Sikorsky Aircraft division of defendants United Technologies Corporation of New York City and United Technnologies Corporation collided and exploded at a waterside air show in Pocitos, Montevideo, Uruguay.

Plaintiffs originally commenced their actions for negligence, breach of warranty, and strict products liability in 1978 (the Lopez plaintiffs) and 1980 (the others). After a decade of pretrial procedural wrangling, Justice Edward Greenfield reinstated the actions on February 13, 1990. fn3 Innumerable requests for disclosure and responses thereto have

resulted in at least five court conferences and significant motion practice. Both sides claim that they are entitled to much but have been given little.

Motion 23

The Motion. By Motion 23 defendants move, pursuant to CPLR 3126, to preclude plaintiffs or, alternatively, pursuant to CPLR 3212, for summary judgment.

Much of the factual background of the cases is not in dispute. Sikorsky built the helicopters in or about 1957 for the United States Navy. According to plaintiffs, at the time of delivery the helicopters had all of the "internal" equipment of cargo lift mechanisms, including two cargo release mechanisms: an electric one, which could be activated by either the pilot or the co-pilot by pressing a button on their respective "flight control sticks"; and a mechanical one, that the pilot could activate by pressing his right foot on a pedal on the cabin floor. Plaintiffs note that the pilot would have to remove his right foot from the rudder control pedal to activate the cargo release pedal, and that the co-pilot would find it difficult or impossible to activate it.

Plaintiff claims that either at the time of delivery or in 1971, when the Navy overhauled the helicopters at its Pensacola (Florida) Naval Air Station, an external cargo hook manufactured by a supplier named Eastern Rotocraft was installed, and that in either event Sikorsky personnel supervised the hook installation.

Later in 1971 the United States sold the helicopters, including the cargo mechanisms, to the Uruguayan Navy.

On the date in question, A-061, commanded by Captain Waldmar Perdomo, hovered over a jeep parked on or near a crowded beach, while a "four-legged bridle", attached to the four corners of the jeep, was connected to the helicopter's cargo hook. The helicopter ascended and flew out over the ocean, with the jeep horizontal, whereupon one corner of the bridle loosened, causing the jeep to tilt forward and the helicopter to destabilize. The helicopter, nose now tilted somewhat downward, attempted to return to where the jeep had been hoisted. However, due to the destabilization and the weight of the jeep, the helicopter lost altitude, the jeep hit rocks along the beach, and the helicopter was dragged towards the ground, where it crashed into A-062 and exploded, injuring the infant-plaintiff-spectators.

Plaintiff has submitted (Opposition Exhibit 11) the Affidavit of Carlos Tochodjuklian, dated March 2, 1999, stating, in full, as follows:

On November 14, 1971 I was standing on the beach at Pocitos, Montevideo, Uruguay viewing the air show demonstration of a helicopter lifting and carrying a jeep over the ocean.

While the helicopter was over the ocean, one corner of the carrying sling came off a front corner of the jeep. The forward part of the jeep dipped downward so it was no longer on a level plane.

The helicopter immediately also dipped downward and flew lower and lower. It appeared to be pulled downward by the downward angle of the jeep fn4, it turned shorewards where the other helicopter was

parked near [an] ice cream stand and as it approached the shore it attempted to land near the other helicopter. The jeep hanging below the helicopter struck a pile of rocks supporting the roadway under the parked helicopter. The lifting helicopter fell on the parked one. Everything seemed to explode.

The carrying hook connected to the bottom of the lifting helicopter never opened from the time the helicopter was over the water until the time the jeep struck the rocks.

Plaintiff's expert, Robert Nokes, states (Opposition Exhibit 10) that helicopter flight instructors drum into pilots that "if anything goes wrong while carrying an external load," the pilot should immediately release (in colorful pilot lingo, "pickle") the load. Nokes opines (third unnumbered page) that when the jeep tilted forward, destabilizing the helicopter, the pilot and co-pilot would have tried to release the load, and that "[i]t is logical to assume that the electrical and mechanical release mechanisms failed on this aircraft" due to "a manufacturing defect, a design defect [not giving the co-pilot a mechanical pedal release, or providing a 'fail-safe' automatic release, such as a 'guillotine' or 'shear pin' that would sever the load at a certain level of impact, or by not providing adequate safety warnings] or both."

Defendants reply that plaintiff cannot prevail on a theory of negligent manufacture and/or design of the cargo release mechanisms absent evidence that the pilot and/or co-pilot, who have not submitted affidavits and who may be dead and whose whereabouts apparently are unknown, attempted to activate them.

Defendants point out that Nokes has not laid a foundation for knowledge as to the training of Uruguayan helicopter pilots in general or this particular pilot and co-pilot in particular.

However, if an automobile crashes, killing the driver, and subsequent investigation reveals that the brakes were not working, would a plaintiff have to demonstrate that the driver stepped on the brake pedal? Would a plaintiff have to demonstrate what was taught at the drivers "Driver Education School"? Defendants' argument proves too much. While the matter is not entirely free from doubt, after careful consideration this Court finds that plaintiffs have demonstrated entitlement to present their claims to a jury (at which point the trial judge can always entertain a motion for a directed verdict).

To grant summary judgment it must clearly appear that no material issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is "arguable"; issue-finding, rather than issue-determination, is the key to the procedure.

Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 165 NYS2d 498 (1957) (citations omitted).

The alternative request, to preclude, is denied without prejudice and with the direction that counsel appear for a compliance (and possible settlement) conference before the Court's law clerk, in Room 517, 60 Centre St., on January 19, 2000, at 10:00 a.m.

The Cross-Motion. Plaintiffs cross-move "for Partial

Summary Judgment on their claim that this case arises under the general maritime law"; for summary judgment on plaintiffs' strict products liability, negligent design and/or manufacture, failure to warn, and breach of implied warranties of fitness and merchantability claims; to strike defendants' answers; or, alternatively, to preclude defendants from introducing evidence denying that they designed and/or installed the helicopter external cargo carrying system at issue.

According to plaintiffs (Cross-Moving Affidavit of May 22, 1999 at 3-4), citing numerous cases, admiralty jurisdiction in tort exists when the wrong took place on (or over) navigable waters and bears a significant relationship to traditional maritime activity. This latter criterion depends upon the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and "traditional concepts of admiralty law." Plaintiffs claim that the action arises under "general maritime law" because the United States and Uruguayan Navies operated the helicopters; the helicopters were built for "anti-submarine and air-sea rescue" work; the accident occurred because of a failure to perform the task of carrying cargo over navigable water; and the accident began over water, even though it culminated on land.

"The law is well settled that actions involving aircraft engages in activities traditionally performed by waterborne vessels fall within admiralty jurisdiction." Icelandic Coast Guard v. United Technologies Corp., 722 F Supp 942 (D Conn 1989).

However, while plaintiffs have marshaled much support

for their argument, the request for a declaration that general maritime law governs the instant case (which would entitle plaintiffs to pre-judgment interest) is denied because of the reasons set forth in the opinion of Justice Edward Greenfield, dated April 23, 1998, filed May 1, 1998, which denied this request, and because that opinion, which reserved a decision on the issue until after "a full exploration of the facts [i.e., a trial].", has been affirmed and therefore is now law of the case.

Plaintiffs' request for summary judgment on their strict products liability, negligent design and/or manufacture, failure to warn, and breach of implied warranties of fitness and merchantability claims is denied because , as noted above, at best there are issues of fact. Plaintiffs' request to strike or preclude is denied without prejudice and with the same direction set forth above.

Motion 24

By Motion 24 plaintiff moves to compel defendants to disclose the whereabouts and social security numbers of five of their former employees, to wit, John Baron, Carroll Melton, Byron Pickering, Louis Pulver and Joseph Vetrano, for open commissions for their depositions, and for sanctions for failure to provide such information previously. Defendants claim that federal and state privacy laws prevent the disclosure of such information. In any event, in his reply affirmation, plaintiffs' counsel states (page 2) that "[d]efendants have accidentally provided what information they have to plaintiffs." This information includes addresses for Melton in Texas and for Pulver in Florida. Pickering may be deceased. Plaintiff may submit open commissions for Melton's and Pulver's depositions, with

any proper notice to defendants. The request for sanctions is denied, as the court is not convinced that defendants' were wilful in any failure earlier to produce the information at issue.

Motion 25

By Motion 25 plaintiff seeks to strike defendants' Notice to Take Deposition of Plaintiffs and Demand for Physical Examination and to compel defendants to produce as a deposition witness "a person having knowledge of the facts" and "compelling defendants to produce documents pursuant to CPLR 3111."

Plaintiffs argue that defendants are precluded from deposing plaintiffs pursuant to CPLR 3130(1) because defendants have already served interrogatories on plaintiffs. However, 3130(1) only applies in cases "predicated solely on a cause of causes of action for negligence." Furthermore, even if 3130 applied, this court would grant leave to depose the five plaintiffs, who are alleging serious injuries and whose testimony might be important at trial.

Plaintiffs also argue that they should be deposed "on open commission, or by written questions," and that they should be physically examined in Uruguay "using a physician of their own choice" because they reside in Uruguay and are too poor to travel to the United States, except for shortly before trial. Plaintiffs do indeed live in Uruguay, and were injured in Uruguay by Uruguayan aircraft flown by Uruguayan pilots. Defendants did not sell the helicopters in or to Uruguay, did not own the helicopters when they were sold to Uruguay, and have not attempted to avail

themselves of the Uruguayan justice system (at least not in this action). In its discretion, this Court finds that defendants are entitled to depose and physically examine plaintiffs in New York, by a physician(s) of defendants' choosing, and that doing so just before trial would be impractical and/or result in a greater, rather than lesser, expenditure of resources. Thus the requests to strike are denied.

Defendants are hereby ordered to produce a deposition witness who, in plaintiff's counsel's words, has "knowledge of the HSS-1's design, manufacture, maintenance, sales, servicing, repair and alteration to cargo lifting capabilities", deposition details to be mutually agreed upon.

Plaintiffs state that defendants should be compelled to "produce all documents on the accident HSS helicopters, including their design[,] manufacture, assembly, testing, sales, repair and outfitting." Such a demand is overly-broad, and is denied without prejudice to submission of a more tailored request.

The note of issue must be filed no later than June 30, 2000.

Footnotes

f1 By order dated August 20, 1997, the following actions were consolidated: 7469/78 (Alberto Lopez); 7473/78 (Miguel Lopez); 3052/80 (Stajano); 3051/80 (Tochodjuklian); and 3595/80 (Aparicio).

f2 The helicopters have numerous model and serial numbers, based on who is doing the designating. Both

are considered model S-58 by civilian authorities; H-34A by the United Staes Army; H-34 by the Air force; HSS-1 by the Navy; and HUS-1 by the Marines. One has, at a minimum, serial numbers 143934 and 58698 and the other has, at a minimum, serial numbers 143941 and 58722. The Uruguayan Navy apparently designated them as A-061 and A-062.

f3 The prior history of this case can be gleaned from Cappellini v. United Technology of New York, 79 AD2d 593 (1st Dept 1980) (conditionally dismissing actions and allowing them to be instituted in Uruguay or Connecticut); Cesar v. United Technology of New York, 148 Misc 2d 918 (Sup Ct,, NY County 1990) (reinstating actions in New York because of failure of condition); aff'd 173 AD2d 394 (1st Dept 1991).

f4 As far as this court understood and remembers high school physics, the "angle" of the jeep would not, per se, pull the helicopter down. However the sudden jerk of the jeep might have pulled the helicopter off of its more-or-less horizontal plane, causing the helicopter to descend because the rotor blades would no longer be revolving parallel to the earth.

U.S. NAVAL AIR MINE DEFENSE
DEVELOPMENT UNIT
PANAMA CITY, FLORIDA

26 August 1958

From: Officer in Charge
To: Chief, Bureau of Aeronautics

Subj: HSS-1 Tow configured helicopter; interim report on evaluation of

1. The Naval Air Mine Defense Development Unit accepted HSS-1, BuNo 139024 from bailment by Sikorsky Aircraft Division, United Aircraft Corporation on 1 July 1958. To date a total of twenty one (21) evaluation flights, totaling 20.7 flight hours, have been completed. Below are listed the comments and recommendations of this Unit based on these flights:

a. Magnetic and Acoustic Signatures. Both the magnetic and acoustic signatures of the aircraft have been measured and found to be insignificant in-so-far-as possible mine activation is concerned.

b. Aircraft Stability.

(1) COMMENT. Upon receipt of the aircraft the Sikorsky Aircraft Division recommended that all towing operations be conducted with the Automatic Stabilization Equipment (A.S.E.) in-operative. without the A.S.E. the aircraft is extremely unstable while towing. Controlling the aircraft requires the undivided attention of the pilot giving him little or no time to

concentrate on the actual tow mission. After two such flights it was decided to use the A.S.E. to determine first, if it would work in a tow attitude and second, if it would help stabilize the aircraft. To date the A.S.E. has worked satisfactorily up to and including 22 degrees of fuselage inclination.

(2) RECOMMENDATION. That the HSS-1 be declared unsuitable as a tow helicopter if the A.S.E. cannot be utilized up to 45 degrees of fuselage inclination.

c. Towing Ability

(1) COMMENT. To date tow operations by NAMDDU have been conducted in winds of less than 20 knots. With the generally hot, low wind days prevailing in this area at this time of year, it has been found that when using normal rated power a tow tension of between 2500 and 3000 pounds is the maximum that can be obtained. These low tensions are considered to be borderline acceptable in-so-far-as tow operations are concerned.

(2) RECOMMENDATION. That should the HSS-1 be accepted as a tow helicopter, all commands must be made aware of this marginal ability at low wind velocities.

d. Hook and Hook Release Mechanism.

(1) COMMENT. The throat angle of the present hook is too small to guarantee sucessful engagement of the tow wire under rough water conditions. The manual hook release system has never worked under

any condition of tension. When in the down position the tow boom does not have any dampening device to prevent excessive movement. The electrical hook release system has failed twice.

(2) RECOMMENDATION.

(a) That the hook throat angle be increased.

(b) That the manual hook release system be completely redesigned to guarantee positive hook release under all tensions.

(c) That a hydraulic dampening device be installed to prevent excessive fore and aft tow boom travel.

(d) That an explosive bolt attaching device be installed at the tow boom attachment point to assure release of the tow should the manual and electrical release systems fail.

e. Visibility in Attitudes.

(1) COMMENT. Of prime important to the tow pilot is downward and rearward visibility while towing and during tow wire engagement. The presently installed mirrors do not enable the pilot to see the tow boom during engagement of the tow wire. The co-pilot can see the hook only if he leans far out of the cockpit. While towing it is necessary for the pilot to crab the aircraft and put the tow boom off center if he is to see the hook and the tow.

(2) RECOMMENDATION. That the mirror system be completely redesigned to accomplish the following:

(a) Easy adjustment while in flight

(b) Downward visibility during tow wire pick-up.

(c) Wide angle rearward vision while towing

f. Tail Rotor Drive System.

(1) COMMENT. While still under bailment the contractor observed that higher tail rotor horsepower conditions were being encountered while towing than were encountered under normal flight operations. The original estimate was that the tail rotor and intermediate transmissions would have to be changed after eight hours of flight time utilizing over 150 tail rotor horsepower. The contractor changed the tail rotor transmission and returned it to the factory for a destruction test. Upon completion of this test the hour limits on the tail rotor transmission system were set at 15 hours between 150 and 210 horsepower, 5 hours between 210 and 250 horsepower, 1½ hours between 250 and 310 horsepower and ½ hour above 310 horsepower. An elapsed time clock system was installed to record the tail rotor horsepower used above 150 horsepower and a multiplication factor was supplied to limit the life of the system to a total of 15 hours of operation above 150 tail rotor horsepower. On 23 July 1958 the tail rotor gear box and rubber coupling failed during a tow demonstration in the Gulf of Mexico. The Tail rotor was installed on 14 June 1958 and had 23 hours of which 9 hours was tow time. The rubber coupling had 369 hours of which 17 hours was tow time. The pylon disconnect coupling was changed due to a excessive amount of play on 16 August 1958 with 378 hours of which 17 hours was tow time.

(2) RECOMMENDATION. That the entire tail rotor drive system be redesigned to accommodate these high tail rotor horsepower requirements before the Navy accepts the HSS-1 as a tow helicopter for fleet use.

g. Seats and Pilot Comfort.

(1) COMMENT. While towing with fuselage angles of inclination above 20 degrees it is considered manadatory that the pilots seats be adjustable to prevent him from "hanging on his straps". The present seat design is such that it can be adjusted to only three (3) positions and not easily, if at all, while in flight. In an attempt to make the seat adjustable the contractor has made only the bucket adjustable for tow attitudes and as a result it tends to compress the normal perpendicular seating attitude to that of a vee resulting in severe leg cramps. The co-pilot's feet must be brace on the rear of the cockpit floor under his seat which is both uncomfortable and also highly unsatisfactory should he be required to assist the pilot in an emergency.

(2) RECOMMENDATION.

(a) That the seats be redesigned to accomplish:

1. Ease of adjustment.
2. Better adjustment range.

(b) That foot braces be installed on the cockpit floor for both the pilot and co-pilot.

S/
W.R. MC INTYRE

Copy to:
BAR, E. HARTFORD
USNMDL

[Stamp of Military Court – illegible]

Montevideo, 5 April 1972

The hearing of today's date is signaled at fifteen hundred hours to permit depositions to be made by Commander Waldemar Perdomo, Lieutenant Commander Amilser Gonzalez, S/O de Carga [Loadmaster] Ramon M. Lemos, Cbo. La. Joaquin N. Perez and Mro. La. Flores Corres.

Colonel [sgd. Silva Ledesme]

Tte. Lo. (PAM) [sgd. William Cabrera]

In Montevideo on the fifth day of the month of April, nineteen hundred and seventy two, at fifteen thirty hours, there being in Court Military Examining Magistrate of the 3rd Session, Colonel Federico Silva Ledesme, assisted by the undersigned Secretary, there appeared the person named first who, having promised to tell the truth and having been advised of the provisions of Art. 180 of th C.P.O, the Judge moved to the questioning of the im as follows:

Q. - Asked for his name, nationality, marital status, age, profession and address.

A. - Waldemar Ramon Perdomo Beltran, Uruguayan, divorced, 43 years, Naval Officer, Medanos S/N [.. Illegible..] Eduardo Perez, el Pinar.

Q. - If he knew or believed he knew why he ad been called to make a deposition.

A. - Yes, I think it is because of the accident with the helicopters.

Q. - Tell us, in detail, what happened.

A. - On 14 November 1971, at approximately 17:30 hours he was [...]at? [illegible] Playa Pocitos in order to perform a demonstration of the transport of a load as the pilot of the helicopter [... illegible ...] the time specified he took off, transporting a jeep, and immediately after take-off (start of the flight) he experienced a marked loss of power and initiated the action to abort the take-off. An immediate attempt was made to release the load which could not be achieved for reasons he does not know. During this procedure, the helicopter continued to lose height slowly and turned towards the right, ending its flight close to helicopter A-061, which was in motion close to the take-off point of the undersigned. That although the landing was relatively smooth, the rotor blades of the two helicopters collided, stated a fire in helicopter A-061. That immediately after landing, the undersigned carried out the procedure to switch off the ignition, etc., in accordance with the procedures in force, abandoning the aircraft and subsequently checking the condition of his crew and also of the crew of the other helicopter, checking that their members were safe. That he subsequently helped civilian personnel in carrying somebody who had been injured to a vehicle but that he could not continue with this action as he felt mentally unable to do so. He remembers that some time later he was put into a Naval vehicle and taken to Estación Trouville [Trouville Station], which comes under the Prefectura General Maritima.

Q. - To what did he attribute the significant loss of power stated.

A. - That he does not know to what to attribute it, but that it was a sudden reduction of 400 - 450 rotations.

Q. - Whether the helicopter was in good flying order.

A. - Yes. That the routine tests had been carried out prior to take-off from Laguna del Sauce as also prior to take-off for the maneuver which he was about to perform.

Q. - Whether he was qualified on this type of equipment.

A. - Yes. That he had received training in the United States.

Q. - Whether he had previously carried out this type of maneuver of lifting a load.

A. - Yes. In training and as a demonstration.

Q. - If he knew who had prepared the safety device / arrangement and of what it consisted.

A. - That he does not know. That on arrival he saw an ambulance in place in the area and that when the emergency occurred his major concern was for the public as he could see people on the flight path who he had not seen at first.

Q. - Did he have anything else to add, take away or amend to what he had said.

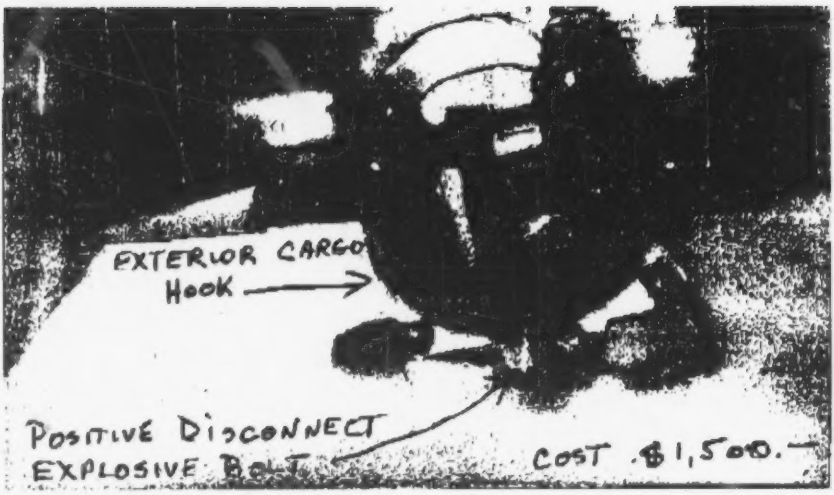
A. - No. That he had nothing to add or to take away.

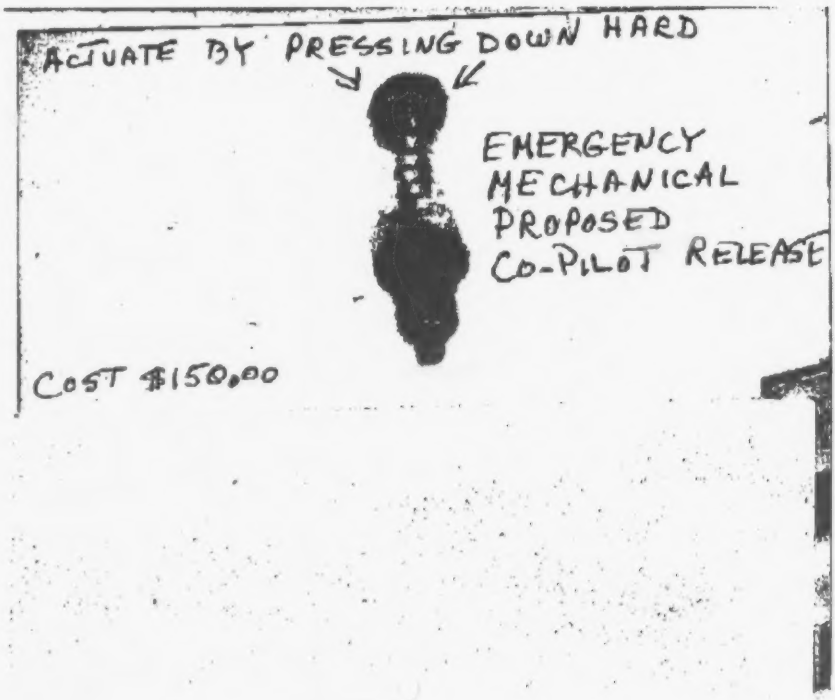
Q. - The reason for his statements.

A. - He had been summoned to make a statement and that this was the truth.

At this point the Judge ordered the deposition to be terminated; it was read by the person making the deposition who ratified it and signed it after the Judge and before me to which I certify .... Let it be recorded.

[Signatures]





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No. 04-1299

MAY 6 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JULIO CESAR WILSON STAJANO, ET AL.,
PETITIONERS

v.

UNITED TECHNOLOGIES CORPORATION, ET AL .

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF

PAUL C. MATTHEWS
Counsel of Record
54 Stone Street
New York, NY 10004
(212) 344-1936
Attorney for Petitioners

CURRY & TAYLOR ♦ WASH D C. ♦ (202) 223-3160 ♦ USSCINFO COM

PRELIMINARY STATEMENT

Petitioners respectfully submit this Brief in Reply to Respondents' Brief in Opposition.

OBJECTIONS TO RESPONDENTS' COUNTER-STATEMENT OF QUESTIONS PRESENTED

Petitioners respectfully object to the Questions Presented submitted by Respondents, inasmuch as they state or imply that: a) Respondents' summary judgment motion was based upon a defense other than Respondents' military contractor defense; b) there is no conflict between the federal circuit courts and the state courts on the federal government contractor defense; and c) that any of Respondents' state law defenses could be determined as a matter of law prior to the threshold determination of whether the general maritime law applied to the subject helicopter catastrophe.

As set forth in more detail below, the Appellate Division made clear that the dismissal was made and affirmed solely upon the federal military contractor defense. Even if Respondents demonstrated entitlement to summary judgment on state law defenses – which they did not – any state law determination would have to await the determination of general maritime law application to the instant naval helicopter catastrophe. This precise issue had been reserved for trial at least twice by the Appellate Division. Respondents' reliance upon defenses which were not, nor could they be, reached in the absence of trial, is untenable.

TABLE OF CONTENTS

PRELIMINARY STATEMENT i

OBJECTIONS TO RESPONDENTS' COUNTER-STATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

POINT I

THE APPELLATE DIVISION CLEARLY AFFIRMED THE DISMISSAL OF PETITIONERS' CLAIMS SOLELY UPON THE FEDERAL MILITARY CONTRACTOR DEFENSE. 1

POINT II

RESPONDENTS' RELIANCE ON STATE LAW PRODUCT LIBILITY DEFENSES IS UNTENABLE, AS THE GENERAL MARITIME LAW APPLIES TO THE SUBJECT ACCIDENT. 3

CONCLUSION 9

TABLE OF CITATIONS

CASES

ALASKA S.S. CO., INC. V. PETTERSON, 347 U.S. 396, 74 S.CT. 601, 98 L.ED. 798 8

AMOCO CADIZ., 491 F.SUPP. 170 (N.D.ILL. 1979) 6

ANGLO EASTERN BULKSHIPS LTD. V. AMERON, INC., 460 F.SUPP. 1212 (S.D.N.Y. 1978) 6

ANGLO EASTERN BULKSHIPS LTD. V. AMERON, INC., 556 F.SUPP. 1198 (S.D.N.Y. 1982) 6

BOYLE V. UNITED TECH. CORP., 487 U.S. 500 (1998) 1

DAMIN AVIATION CORP. V. SIKORSKY AIRCRAFT, 705 F.SUPP. 170 (S.D.N.Y. 1989) 8

EAST RIVER S.S. CORP. V. TRANSAMERICA DELAVAL, 476 U.S. 858, 106 S.CT. 2295 (1986) 7

GARRETT V. AIR LOGISTICS, INC., 1996 WL 492300 (E.D. LA. 1996) 5

HARRISON V. FLOTA MERCANTE GRANCOLOMBIANA, S.A., 577 F.2D 968 (5TH CIR. 1978) 6

HOLCOMB V. ERA HELICOPTERS, INC., 618 F.SUPP 339 (W.D.LA 1985) 5

ICELANDIC COAST GUARD V. UNITED TECHNOLOGIES CORP., 722 F.SUPP. 942 (D CONN 1989) 4, 6, 9

JOHNSON V. UNITED STATES, 333 U.S. 46, 68 S.CT. 391 (1948) 8

KEENE CORP. v. UNITED STATES, 700 F.2D 836 (2D CIR.), CERT. DENIED, 464 U.S. 864, 104 S.CT. 195 (1983) 6

LANDRY v. TWO R. DRILLING COMPANY, 511 F.2D 138 (5TH CIR. 1975) 7

LINDSAY v. MCDONNELL DOUGLAS AIRCRAFT CORP., 460 F.2D 631 (8TH CIR. 1972) 6

MATTER OF THE COMPLAINT OF AMERICAN EXPORT LINES, INC., 620 F.SUPP. 490 (S.D.N.Y. 1985) 6

MOSER v. TEXAS TRAILER CORP., 623 F.2D 1006 (5TH CIR. 1980) 6

O'HARA v. BAYLINER, 89 N.Y.2D 636, 657 N.Y.S. 2D 569, 679 N.E. 2D 1049 (1997), CERT DENIED 522 U.S. 822 5

PRESTON v. FRANTZ, 11 F.3D 357 (2D CIR. 1993) 5

SCHULZ v. PENN. R. CO., 350 U.S. 523, 76 S.CT. 608 (1956) 8

SMITH v. PAN AIR CORP., 684 F.2D 1102 (5TH CIR. 1982) 6

TENNANT v. PEORIA & P.U.R. CO., 321 U.S. 29, 69 S.CT. 409 (1944) 8

WINEGRAD v. NEW YORK UNIV. MEDICAL CENTER, 64 N.Y. 2D 851, 487 N.Y.S.2D 316, 476 N.E. 2D 642 (1985) 2

REPLY TO RESPONDENTS' ARGUMENTS IN OPPOSITION

POINT I

THE APPELLATE DIVISION CLEARLY AFFIRMED THE DISMISSAL OF PETITIONERS' CLAIMS SOLELY UPON THE FEDERAL MILITARY CONTRACTOR DEFENSE.

Respondents' claim that this action was dismissed upon any defense other than the federal military contractor defense is belied by the March 23, 2004 Decision and Order of the Supreme Court of the State of New York, Appellate Division, First Department (3a-4a) which clearly held:

> Having now obtained the materials necessary to resolve previously open questions of fact, defendants' motion for summary judgment, based upon a more detailed government-contractor defense, was appropriate . . . [t]he newly amended affirmative defense satisfied the three-pronged test of government approval of reasonably precise specifications, conformity to those specifications, and a warning to the government about dangers known to the contractor in the use of the equipment (Boyle v. United Techs. Corp., 487 U.S. 500, 512 [1988]). Summary judgment was thus properly granted. *Id.*, at (4a).

Previously, Respondents attempted to obtain dismissal on their "lack of causation" argument, but failed. (39a-48a). In affirming denial of Respondents' prior motion for summary judgment, the Appellate Division recognized that Respondents failed to satisfy their well-settled burden of proof for summary judgment under New York State law:

> Defendants' motion for summary judgment was properly denied since they failed to come forward with evidence of causation eliminating the possibility that the accident was caused by a design or manufacturing defect in the helicopter's external cargo carrying system (see, Winegrad v. New York Univ. Medical Center, 64 N.Y.2d 851, 853). (37a).

The record below is bereft of any attempt by Respondents to produce what they previously lacked, admissible evidence of causation eliminating the possibility that the catastrophe which injured the Petitioner was caused by a design or manufacturing defect in the subject helicopter's cargo carrying system. Indeed, had Respondents produced such evidence after already being denied summary judgment on the issue of causation – which they did not – Respondents would also have been required to demonstrate the impossible, *to wit*, that newly discovered evidence not available previously justified a renewal of their motion for summary judgment on causation.

Clearly, Respondents had not met this onerous burden, nor were Respondents granted summary judgment based upon causation, as recognized by the

Appellate Division.[1]

POINT II

RESPONDENTS' RELIANCE ON STATE LAW PRODUCT LIBILITY DEFENSES IS UNTENABLE, AS THE GENERAL MARITIME LAW APPLIES TO THE SUBJECT ACCIDENT.

Respondents' assertion that state law provides an alternative ground to deny this application for certiorari is erroneous, inasmuch as the subject catastrophe is subject to the general maritime law.

Aside from the fact that Respondents never justified a dismissal based upon state product liability law,[2] the circumstances strongly indicate that general maritime law applies to the Petitioners' claims, a threshold issue left undetermined due to an erroneous dismissal based upon the federal military contractor defense.

Petitioners presented uncontroverted facts by an eyewitness to the subject action which clearly established admiralty jurisdiction over the instant proceeding.

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[1] For this reason alone, Respondents' reliance upon the improper *dicta* issued by the Supreme Court (Kornreich, J.) on an issue never placed before that trial Court, is patently improper.

[2] Indeed, Respondents shamelessly claim a fact, belied by their own documents, that "no operator, including the U.S. Government and the Uruguayan Government, reported to Respondents any incident or accident caused by an external cargo sling and hook system." Respondent's Brief In Opposition, at 24. *Compare, e.g.*, August 26, 1958 letter of U.S. Naval Air Mine Defense Unit, "d. Hook and Hook Release Mechanism"

The trial Court's Decision and Order of January 4, 2000 correctly noted that "actions involving aircraft engaged in activities traditionally performed by waterborne vessels fall within admiralty jurisdiction." (44a)(citing *Icelandic Coast Guard v. United Technologies Corp.*, 722 F.Supp. 942 (D Conn 1989). Likewise, the Court recognized that "plaintiffs have marshaled much support for their argument that General Maritime Law governs the instant case . . .." *Id.*

The trial court denied an earlier attempt by Respondents to seek judgment, as a matter of law, that the General Maritime Law was inapplicable. The Appellate Division, First Department affirming, squarely rejected Respondents' argument, finding that the:

> Admiralty Extension Act may be satisfied even when the complained of injury is suffered on land, provided only that the injury is caused by a vessel on navigable waters . . . [it is] neither unusual nor improper [that Plaintiffs] establish[ed] jurisdiction for their admiralty claims at the outset of the case provisionally by the means of a non-frivolous assertion of the jurisdictional elements. *Cesar v. United Technology of New York*, 3/1/99 N.Y.L.J. 28, col.

The Appellate Division clearly found that maritime jurisdiction was established for purposes of this action by the non-frivolous assertions of fact made by Petitioners' counsel, leaving the final determination of whether maritime law controlled until it could be established factually, at trial. On June 27, 2000, the

Appellate Division, First Department recognized:

> On the issue on the applicability of general maritime law, previously left unresolved by this Court (258 A.D.2d 424), while plaintiffs have submitted additional competent *and undisputed* evidence that the accident began over water, they still have not established a "maritime nexus" sufficiently to warrant a ruling [emphasis added]. Factual issues continue to exist as to whether the subject helicopter was designed to perform, and in fact at the time of the accident was performing, an activity traditionally performed by waterborne vessels (see O'Hara v. Bayliner, 89 N.Y.2d 636, 641-644, cert denied 522 U.S. 822).[3]

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[3] While Petitioners respectfully disagree with the denial of their summary judgment motion seeking to assert general maritime law, a trial was required, at the very least, to determine the threshold "maritime nexus" issue. The undisputed facts prove that the helicopter was demonstrating its ability to lift and *carry a jeep over water*. This activity, conducted by a naval helicopter, *could only* have traditionally been performed by an amphibious landing craft or other vessel. *See e.g. Preston v. Frantz*, 11 F.3d 357, 359 (2d Cir. 1993)("the helicopter . . . 'was engaged in a function traditionally performed by water-borne vessels; the ferrying of passengers' from the mainland over the high seas to an island.")(citing *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 219, 106 S.Ct. 2485, 92 [1986]); *see also Holcomb v. ERA Helicopters, Inc.*, 618 F.Supp 339, 343 (W.D.La 1985)("The crash of [a] helicopter, while it [is] being used in place of a vessel to ferry personnel and supplies to and from offshore drilling structures, bears the type of significant relationship to traditional maritime activity which is necessary to invoke admiralty jurisdiction."); *Garrett v. Air Logistics, Inc.*, 1996 WL 492300, Civ. A. No. 95-2190, *3 (E.D.La. 1996)("the ferrying of passengers from an island, albeit an artificial one, to the shore. This activity is clearly the type of activity that raises admiralty concerns and has more of a relationship to maritime law than the law of

(38a)

United Technologies Corp., was, and is, in the maritime business of making maritime products, *to wit*, naval helicopters, manufactured for and sold to the

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Louisiana.")(citing *Offshore Logistics, Inc. v. Tallentire, supra*).

The naval helicopters were fitted with both a 600 lb. capacity air-sea rescue hoist, and a 5,000 pound capacity external cargo carrying system when they arrived in Uruguay. The external cargo hook was Sikorsky part number S1650-62195. (R. 720) The general practice of the United States Navy "when altering the mission of the HSS-1 from anti-submarine warfare to external cargo carrying, is to order the entire installation kit [Sikorsky S1650-62195]." *Id.*

It is well settled that "[a]dmiralty jurisdiction in tort exists when the wrong (1) took place on navigable waters ('situs') , and (2) 'bear[s] a significant relationship to traditional maritime activity' ('status')." *See In the Matter of the Complaint of American Export Lines, Inc.*, 620 F.Supp. 490, 512 (S.D.N.Y. 1985)(quoting *Keene Corp. v. United States*, 700 F.2d 836, 843 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195 (1983)[citing *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 254-61, 93 S.Ct. 493, 497-501 (1972) and *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75, 102 S.Ct. 2654, 2658 (1982].) Moreover, "[m]any courts have recognized that '[a] tort cause of action exists [in admiralty] for the negligent design and/or manufacture of a product, even though the conduct complained of may have occurred ashore." *Id.* (citing *Moser v. Texas Trailer Corp.*, 623 F.2d 1006, 1013 (5th Cir. 1980), *Smith v. Pan Air Corp.*, 684 F.2d 1102, 1111 (5th Cir. 1982), *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 635 (8th Cir. 1972), *In re Oil Spill by the Amoco Cadiz.*, 491 F.Supp. 170, 176 (N.D.Ill. 1979), *Anglo Eastern Bulkships Ltd. v. Ameron, Inc.*, 460 F.Supp. 1212, 1213 (S.D.N.Y. 1978), *Anglo Eastern Bulkships Ltd. v. Ameron, Inc.*, 556 F.Supp. 1198, 1200-04 (S.D.N.Y. 1982); *Harrison v. Flota Mercante Grancolombiana, S.A.*, 577 F.2d 968, 977 (5th Cir. 1978).

Clearly, the type of vessel is traditionally maritime in nature. *See e.g. Icelandic Coast Guard v. United Technologies Corp.*, 722 F.Supp. 942 (D. Conn 1989) (finding that helicopter manufactured for marine rescue and other maritime operations satisfied traditional maritime activity requirement.)

United States Navy for use in maritime activities. The accident helicopter was being used for its intended purpose, to carry a jeep over navigable waters, when a defect in the hook and cargo release – a defect which Respondents clearly had knowledge of since, at least, August 26, 1958 (49a-54a) – proximately caused the helicopter to crash, injuring Petitioners.

The threshold determination of whether the General Maritime Law controls is significant, inasmuch as "[d]rawn from state and federal sources, the General Maritime Law is an amalgam of traditional common-law rules, modifications of those rules and newly created rules." *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 864-65, 106 S.Ct. 2295, 2299 (1986). The General Maritime Law displaces the substantive laws of New York State in this action. *Id.* ("With admiralty jurisdiction comes the application of substantive admiralty law.") This includes the effect of substantive General Maritime Law upon, *inter alia*, the Petitioners' claims of strict products liability. *Id.*, at 865, 106 S.Ct., at 2299 ("We join the Courts of Appeals in recognizing products liability, including strict liability, as part of the general maritime law.").

The General Maritime Law's substantive effect on the claims asserted herein is substantial. The determination of the controlling substantive law absolutely affects Petitioners' and Respondents' trial strategies and burdens of proof. In *Landry v. Two R. Drilling Company*, 511 F.2d 138 (5th Cir. 1975), the Fifth Circuit Court of Appeals recognized:

> The burden on the plaintiff to prove proximate cause in actions based on the Jones Act and general maritime law is

> very light. Indeed, the most noted commentators in the field have called it 'featherweight.' Gilmore & Black, Admiralty (1957), s 6– 36, p. 311. The jury in such cases is entitled to make 'permissible inferences from unexplained events.' Johnson v. United States, 333 U.S. 46, 49, 68 S.Ct. 391, 92 L.Ed. 468 (1948), whether the case is brought under the Jones Act, id., or under general maritime law, Alaska S.S. Co., Inc. v. Petterson, 347 U.S. 396, 74 S.Ct. 601, 98 L.Ed. 798 per curiam (1954). The Supreme Court has repeatedly said that it is not the function of the court . . . to 'search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that proof gives equal support to inconsistent and uncertain inferences.' Tennant v. Peoria & P.U.R. Co., 321 U.S. 29, 35, 69 S.Ct. 409, 412, 88 L.Ed. 520 (1944); Schulz v. Penn. R. Co., 350 U.S. 523, 526, n.8, 76 S.Ct. 608, 100 L.Ed. 668 (1956).

Moreover, "under admiralty law, there is traditionally a strong interest in ensuring uniformity of decision." *American Export Lines, supra*, at 513. This is particularly so where, as here, the State of New York has virtually no interest in competing choice of laws, inasmuch as the accident occurred in Uruguay, the Plaintiffs were, and are, Uruguayan citizens, and the headquarters of the Defendants is not located in the State of New York. *See e.g., Damin Aviation Corp. v. Sikorsky Aircraft*, 705 F.Supp. 170, 174 (S.D.N.Y. 1989)("Connecticut is the principal place of business of Sikorsky . . .") The strong interests of a uniform law of

admiralty clearly outweigh the application of potentially inconsistent state law.

Application of the General Maritime Law to aircraft used in maritime activities is not new, and Respondents are well aware of such jurisprudence. *See e.g. Icelandic Coast Guard v. United Technologies Corp.*, 722 F.Supp. 942 (D. Conn 1989).

This Court should grant certiorari to resolve the vast departures from the requirements of federal law involved in this proceeding and protect the uniformity of the General Maritime Law.

CONCLUSION

It is respectfully requested that this Petition for a Writ of Certiorari be granted and that this Court exercise its jurisdiction.

Respectfully submitted,

Paul C. Matthews, Esq.
Counsel of Record
54 Stone Street
New York, New York 10004
(212) 344-1936
Attorney for Petitioners

(2)

No. 04-1299

IN THE

Supreme Court of the United States

JULIO CESAR WILSON STAJANO, ET AL.,
PETITIONERS

v.

UNITED TECHNOLOGIES CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

APPENDIX TO REPLY BRIEF

PAUL C. MATTHEWS
Counsel of Record
54 Stone Street
New York, NY 10004
(212) 344-1936
Attorney for Petitioners

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

NOTICE TO THE COURT ii

EXHIBITS 1ra

POINT XI 7ra

NOTICE TO THE COURT

POINT IX - THE MARITIME LAW APPLICABLE IN THIS LITIGATION WAS A PART OF THE 258 PAGE AFFIRMATION DATED NOVEMBER 26, 2001 IN OPPOSITION TO DEFENDANTS' MOTION TO AMEND, ET AL URGES THE MILITARY CONTRACTORS DEFENSE.

IT WAS THE FIRST DOCUMENT FILED OPPOSING DEFENDANTS' MOTION TO AMEND AND ADD MILITARY CONTRACTORS DEFENSE AND FOR SUMMARY JUDGMENT.

THE MOTION COURT TOTALLY IGNORED THE ISSUE OF MARITIME LAW ON A NAVAL HELICOPTER SPECIFICALLY DESIGNED TO PERFORM A MARITIME TASK WHICH IT WAS DOING AT THE TIME OF THE ACCIDENT.

THE AFFIRMATION AND EXHIBITS WERE PART OF THE RECORD ON APPEAL, PAGES 1609-3991.

EXHIBITS

EXHIBIT	DESCRIPTION
1	Summons & Verified Complaints; Defendants' Amended Verified Answers
2	El Dia Newspaper November 15, 1971, diagram of helicopter flying over bay
3	El Dia Newspaper, November 17, 1971, Diagram of helicopter striking embankment
4	Photograph of emergency pedal
5	El Dia Newspaper, November 15, 1971, photograph of Helicopters colliding
6	Sikorsky Seventy-Five Years of Aviation Firsts - Cover Page
7	November 19-21, 1952 - XHSS-1 Helicopter Mock-Up Review Board - pages 14 & 17
8	Forca Aerea Barsileira: Sikorsky SH-34J
9	1H11 - FAA Type Certification

10 Engineer Leon Jacobson's EBT - January 26, 2001, p. 312

11 Engineer Leon Jacobson's EBT - January 26, 2001, p. 312-315

12 Engineer Leon Jacobson's EBT - January 26, 2001, p. 160-161

13 Engineer Leon Jacobson's EBT - January 26, 2001, p. 11

14 Engineer Leon Jacobson's EBT - January 26, 2001, p. 11 & 155

15. Engineer Leon Jacobson's EBT - January 26, 2001, p. 156, 312 & 315

16. From Engineer Leon Jacobson's EBT - re: his employment

17. Choctaw, page 45-46 - H-34

18 Engineer Leon Jacobson's EBT - January 26, 2001, pp. 18-20

19 Janes All the World Aircraft - pages 193-209

20 Choctaw, pages 45-46 - H-36

21 Janes All the World Aircraft - pp. 193, 217, 221

22	Engineer Leon Jacobson's EBT - January 26, 2001, pp. 142 & 145
23.	Helicopter - pp. 215-222
24.	Choctaw - pp. 34, 40, 41.
25	Trial Testimony of Peter Sevenoff - San Diego, California, May 20, 1981 - pp. 1624-1628
26	Dr. Waldron Affidavit and Attachments with annexed exhibit Sikorsky Aircraft FAA Approval Rotocraft Cargo Sling Supplement No. 1 - August 2, 1956
27	Detail Specification HUS-1 - Jacobson's affidavit
28	December 8, 1954 Sikorsky Letter - 4127320
29	SH34G Parts Breakdown Manual
30	Three Photos of Hook
31	Blueprint of Hook
32	FAA Helicopter Accident Report
33	deleted
34	DD-250

35	Sikorsky Plant Arrangement
36	Sikorsky Personnel List
37	Letter dated October 30, 1958
38	Attorney Kevin Cook Transcript - pp. 53,54
39	October 19, 1959 Letter - Ser Z/1814-C1
40	Attorney Cook's Good Faith Affirmation
41	U.S. Navy HSS-1 - Standard Aircraft Characteristics Bates 8034 - attached to Engineer Jacobson's affidavit
42	May 1, 1959 letter - Sikorsky
43	HSS-1 Detail Specs Attached to Engineer Jacobson's affidavit
44	HSS/HUS Aircraft Service Change No. 37
45	Jacobson's Affidavit - Change 84 - Bates 1669-2266
46	Naval Speed Letter dated November 12, 1959 - ASC#84

47	Naval Speed Letter September 21, 1959 - ASC#84 Trial Installation
48	Sikorsky letter dated January 19, 1959
49	February 2, 1959 Bureau of Aero - Sikorsky
50	June 26, 1958 - Accident Report
51	Sikorsky Aircraft - June 27, 1958
52	Sikorsky letter to BAR regarding Brouillette of Engineering Department
53	May 1, 1959 Sikorsky Retrofit Kits
54	Change Order 25, September 20, 1956
55	January 20, 1959 re: windows
56	October 29, 1956 Contract Change
57	Sikorsky H-34 pp. 76-81
58	June 27, 1958 - SSD-1-3183 re: Service Support of the HSS-1N
59	List of known naval repair facilities
60	Robert Nokes affidavit

61 Appendix A - H-34

POINT XI

THE TRIAL COURT MUST IMPOSE GENERAL MARITIME LAW IN THIS DISPUTE WHEN A JURY IN A BIFURCATED TRIAL DECIDES THAT THE ACCIDENT BEGAN OVER WATER AND CULMINATED ASHORE

The Military Contractors Defense which is a "common law" cause of action, in this instance must be displaced by General Maritime Law, because it conflicts with same.

Whenever state law or federal common law conflicts with General Maritime Law it must be displaced by the latter.

Some of the earlier decisions in the State of New York resolved conflicts between Federal Maritime Law and state law to the favor of Federal Maritime Law.

One of the earlier decisions determined that when a maritime tort occurs in navigable waters, state law is therefore inapplicable and the General Maritime Law of the United States applies, see **Panama Railroad Co. v. Johnson,** 264 U.S. 375 (1924); **Garrett v. Moore-McCormack Co., Inc.**, 317 U.S. 239,243-245 (1942); **Riley v. Agwilines Inc.**, 296 N.Y. 402 (1947, in which the Court of Appeals of the State of New York held at pages 405-406 that in litigation involving the validity of a seaman's general release, a shipowner proponent of said release has the burden of proof, of showing that the release is valid, which is polar opposite of state procedural practice:

> "Since it is beyond the power of the State by legislation or judicial decision to mold or modify the maritime law (Knickerbocker Ice Co. v. Stewart, 253 U.S. 149), we must look to the decisions of the Federal Courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our own courts or statutes of the State which conflict with the rules of liability established in the Federal Courts (Robins Dry Dock & Repair Co. v. Dahl, 266 N.Y. 499, overruling Malleny v. Standard Shipbuilding Corp., 237 N.Y. 250.)"

Riley was followed and cited in **McFall v. Compagnie Maritime Belge**, 304 N.Y. 314 (1952) which dealt with issues of Federal Maritime Law concerning an injury to a maritime worker (longshoreman) aboard the defendant's vessel and provided primacy to Federal Maritime Law.

Thereafter, another action called **Celeste v. Prudential Steamship Company**, 35 NY2d 60, 358 NYS2d 729, the statute of limitations and procedural practice was forced to yield to Federal Maritime Law, though the action was tried in a court in the State of New York.

Fairly recently in **Lerner v. Karageorgis**, 66 NY2d 479 (1985) at pp. 484-485 our highest court in the State of New York displaced state law in a dispute between state procedural law and Federal Maritime Law, state procedural law was compelled to be displaced by Federal maritime law:

> In maritime cases, State courts must apply Federal law "to secure a single and uniform body of maritime law" (Matter of Rederi [Dow Chem. Co.], 25 NY2d 576,581, cert denied 398 US939; see also, Ugarte v. United States Lines, 64 NY2d 836, rearg denied 64 NY2d 1041; Alvez v American Export Lines, 46 NY2d 634, affd 446 US 274). A State court may not limit a party's substantive rights by applying its own procedural rules if those rules would "significantly affect the result of the litigation, i.e., would be outcome determinative" (Matter of Rederi [Dow Chem. Co.], supra, at p 581). Thus CPLR 4544, which is a rule of evidence may not be employed to nullify a contractual limitation enforceable under Federal maritime law.

In **Public Administrator of the County of New York, as Administrator of the Estate of Famuel Dias de Souza v. Frota Oceanica Brasileira, S.A., et al.**, N.Y.L.J., 10/7/81, p. 13, col. 5, Justice Greenfield dispensed with the New York State General Obligations Law and recognized that Federal Maritime Law was superior with regard to a seaman's release under **Garrett, supra** when both conflicted:

> The motion is based on General Obligations Law Sec. 15-108 which deals solely with the effect of a release given to one or more persons liable or claimed to be liable in tort on claims for the injury against other tort

feasors. The statute is irrelevant to the issue of whether releases given by widows of seamen who were lost at sea when the S.S. Sylvia L. Ossa went down are a defense to the claims brought by the Public Administrator. Moreover, the New York law does not govern the issue of releases in maritime cases, Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942). (Emphasis added)

In **Rogers v. City of New York**, 46 Misc. 2d 373,259 N.Y.C. 22d 607 (Special Term, New York County, 1965)at pages 374, 375, the issue of the Admiralty doctrine of laches arose as to whether it bars the action. Special term, New York County disposed of it as follows:

"It is settled that the rights and liabilities of the parties in connection with a maritime tort depend upon and arise out of maritime law (Spencer Kellogg & Sons v. Hicks, 285 U.S. 502) Plaintiff's rights are rooted, not in State law, but in Federal maritime law. Jurisdiction of this court over the action rests upon the so-called 'saving-to-suitors clause' of the Judiciary Act of 1789 (see 1 Benedict, Admiralty (5th ed) sec. 22). When the State opens its courts to this type of action, which the Constitution has placed under national power to control in 'its substantive as well as procedural features' (Panama R.R. Co. V. Johnson, 264 U.S. 375, 386), our courts must afford plaintiffs the full benefit of Federal law (Garrett v. Moore McCormack Co., 317 U.S. 239).

> Even if plaintiffs are seeking to enforce State created remedies for this right, Federal maritime law is controlling (Pope & Talbot v. Hawn, 346 U.S. 406,409). Were this an action between private suitors, plaintiffs' Federal substantive admiralty rights could not be defeated simply by the mechanical application of a State Statute of Limitations, on the 'admiralty side' or the 'law' side of Federal court or in a state court having jurisdiction to enforce Federal maritime rights (Pope & Talbot v. Hawn, supra; p. 411, Kermaree v. Compagnie Generale, 357 U.S. 625; Garrett v. Moore McCormack Co., supra; Chelentis v. Luchenbach S.S. Co., 247 U.S. 372; see, also Larios v. Victory Carriers, 316F.2d 63 (C.A. 2d 1963).

And thereafter Special Term in New York County finding that Federal Maritime Law is equitable it ordered a hearing on the issue of "collateral sources" as to whether [they] have any effect on diminishing or reducing a jury verdict.

Federal Maritime Law prohibits same and dispensed with the effect of reducing a jury verdict through the use of a collateral source, **Eichel v. New York Central R.R.**, 375 US 253 and proceeded through **Haughton v. Blackships, Inc.**, 462 F.2d 788, 790 (5th Circ. 1972), 1972 AMC 1923, 1926; **Gypsum Carrier, Inc. v. Handelsman**, 307 F.2d 525,534 (9th Circ. 1962), 1963 AMC 175, 187; **Omi Yukon Limitation Proceedings (Connecticut National Bank v. Dufy)**, 733 F. Supp. 14 (SDNY 1990), 1990 AMC 2275 at 2281; **East River**

Steamship v. Transamerica DeLaval Steam Turbine, 476 U.S. 858(1986); 106 S.Ct. 2295,90 L.Ed 865, and

The Supreme Court in **Monessen Southwestern R. Co. v. Morgan**, 486 U.S. ____, 108 S.Ct. 1837, 100 L.Ed. 2d 349, (1988), a Pennsylvania procedural matter which clashed with the method of calculating interest for future pain and suffering in a Federal Employee Liability (FELA) case. The Court stated on page 1850:

> This reading of the statute comports with the congressional intent to provide liberal recovery under the FELA. Of course, by applying rule 238 of the Pennsylvania Rules of Civil Procedure, the state trial court went further and allowed prejudgment interest on appellee's general verdict, including interest on appellee's damages for pain and suffering and future losses, which are not appropriate objects for a compensatory award of prejudgment interest.

On page 2446 the Supreme Court ruled that "though the statute was procedural it was outcome determinative":

> The trial judge in this case believed that the choice among methods of calculating present value was a procedural issue, and she "blindly applied the total offset method [of] Kaczowski v. Bolubasz,491Pa. 561,421 A. 2d 1027 (1980)." 513 Pa. 86, 100, 518 A. 2d 1171, 1178 (1986) (dissenting opinion below); see also TR. 577-578.

Causation in Federal Maritime Law cases is featherweight, see **Landry, Admx. v. Two R. Drilling Co., et al.**, 517 F.2d 675, 1975 AMC 2135 (5th Cir 1975); **Milos v. Sea-Land Service, Inc.**, 478 F. Supp. 1019 (SDNY 1979), affirmed 622 F.2d 574; **Bowden v. United States**, ____F. Supp. ____ (ED Va. 1979), 1982 AMC 2064; **Davis v. Hill Engineering**, 549 F.2d 314 (5 Gr. 1977), 1977 AMC 1090; and **Matthews v. Ernest Russ Steamship Co.**, 603 F.2d 677.

State practice requires causal connection in a land tort matter with the absolute requirement that a physician must testify as to supporting causal connection.

This rule of law is opposite in a Federal Maritime law case of **Sentilles v. Inter-Caribbean Shipping Company**, 361 US107 (1959), 1960 AMC 10, it is not required to have a doctor testify in order to prove causal connection. No physician is required to testify to anything with regard to causal connection.

See **Sentilles, supra**, Supreme Court of the United States; **Fitzgerald v. A.L. Burbank & Co.**, 451 F.2d 670, 1972 A.M.C. 207.

Maritime Law is international in scope, **Lauritzen v. Larsen** 345 U.S. 571, 73 S.Ct. 921, and it was referred to and relied upon in a treaty discussion in which the Supreme Court in **Vaughan v. Atkinson**, 369 US 527 (1962)) mentioned how the impact of a treaty encompassing maritime law affects other Federal Maritime Law and Federal Statutory and Common Law, **Romero v. International Terminal Operating Co.**, 358 U.S. 354, 79 S.Ct 468; 1959 AMC 832 (1959).

The jury trial in this case must be bifurcated and the first issue to be determined by the jury will be the issue of the factual basis for maritime law. See the Decision of Appellate Division, affirmed June 27, 2000 (273 AD2d 162, 711 NYS 2d 711).

Therefore, it is this plaintiffs' position herein, that the jury will determine issues of fact that the General Maritime Law pertains to this case.

In the event of a conflict between General Maritime Law and "Military Contractors Defense", the latter must be displaced by the General Maritime Law to adopt a tort law as administered by the trial judge.

It is plaintiffs' position that in a bifurcated trial the first issue sent to the jury for their determination is whether the facts initially presented constitute facts sufficient upon which to base a cause of action under General Maritime Law.

The General Maritime Law is predicated upon the situs of the accident helicopter, over water, at the beginning of the accident and its culmination over land, when and where accident terminated.

See 1. Drawing extracted from El Dia newspaper showing the path of the helicopter over water **(Exhibit 2)**;

2. Jeep on the return striking the embankment after it was destabilized **(Exhibit 3)**; and,

3. Drawing showing the accident helicopter landing ashore **(Exhibit 4)**.

At the point when the jeep came ashore, that is the culmination and this imposes International Maritime Law.

The court in this bifurcated case must impose General Maritime Law which is superior to statutory federal law.

See **Grubart v. Great Lakes Dredge & Dock Co.**, 513 U.S. 527, 1995 AMC 913 (1995; **Sisson v. Ruby**, 497 U.S. 358 (1990), 1990 AMC 1801; **Brown v. Eurocopter**, 387 F. Supp. 2d 515 (S.D. Tex. 1999), 1999 AMC 1949; **Williamson v. Petroleum Helicopter**, 32 F. Supp. 2d 456 (S.D. Tex. 1999), 1999 AMC 1404; **In re Amtrack Sunset Limited**, 1997 AMC 2962 (11 Cir. 1997) (Admiralty Extension Act, 46 U.S.C. app. § 740 (1975); **Walther v. Hell's Canyon Adventures, Inc.**, 1997 AMC 2098 (D. Ore. 1997); **McDonald's City of New York**, 1997 AMC 868 (Sup.Ct., App. Div., N.Y.2d Dept. 1996); **Coats v. Penrod Drilling Corp.**, 61 F.3d 1113 (5 Cir. 1995), 1996 AMC 1; **McClenahan v. Paradise Cruises, Ltd.**, 1995 AMC 1899 (D. Hawaii 1995).

WHEREFORE, it is respectfully requested that defendants motion be denied in all respects and that the court grant such other, further and different relief as it deems just and proper.

Affirmed this 26th day of November, 2001

_____

KENNETH HELLER